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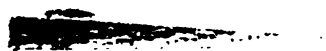
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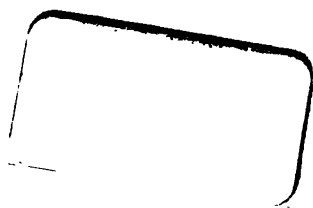
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21

REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS C

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE,
CORRECTED TO JANUARY 14, 1907, AND A TABLE OF
CASES REVIEWED BY THE SUPREME COURT
TO THE DATE OF THE PUBLICATION
OF THIS VOLUME

VOL. CXXV

A. D. 1907

LAST FILING DATES OF REPORTED CASES:
FIRST DISTRICT, MARCH 23, 1906.
SECOND DISTRICT, MARCH 10, 1906.
THIRD DISTRICT, MARCH 20, 1906.

EDITED BY
W. CLYDE JONES AND KEENE H. ADDINGTON,
AUTHORS OF JONES & ADDINGTON'S SUPPLEMENTS TO
STARR & CURTIS'S ANNOTATED ILLINOIS STATUTES.

CHICAGO
CALLAGHAN & COMPANY
1907

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Rec. May 22, 1907

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THE VAIL COMPANY, COSHOCTON, OHIO

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO JANUARY 14, 1907.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—ALONZO K. VICKERS.....Vienna.
Second District—WILLIAM M. FARMER.....Vandalla.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—GUY C. SCOTT.....Aledo.
Fifth District—JOHN P. HAND.....Cambridge.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Scott is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, Springfield.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTERS.

W. CLYDE JONES and KEENE H. ADDINGTON, comprising the law firm of Jones & Addington, 100 Washington street, Chicago.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Alfred R. Porter, Ashland Block, Chicago.

EDWARD O. BROWN, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

JESSE HOLDOM, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

HENRY V. FREEMAN, Presiding Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, LaSalle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

GEORGE W. THOMPSON, Justice, Galesburg.

HENRY B. WILLIS, Justice, Elgin.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermillion.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

*This court is a branch of the Appellate Court of the first district and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185.

CLERK—W. C. Hippard, Springfield.

FRANK D. RAMSAY, Presiding Justice, Morrison.

JAMES S. BAUME, Justice, Galena.

LESLIE D. PUTERBAUGH, Justice, Peoria.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Albert C. Millspaugh, Mount Vernon.

JAMES A. CREIGHTON, Presiding Justice, Springfield.

COLOSTIN D. MYERS, Justice, Bloomington.

HARRY HIGGEE, Justice, Pittsfield.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:*

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

ENOCH E. NEWLIN, Robinson.

PRINCE A. PEARCE, Carlini.

JACOB R. CREIGHTON, Fairfield.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURBOUGHS, Edwardsville.

ROBERT D. W. HOLDER, Belleville.

CHARLES T. MOORE, Nashville.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

ALBERT M. ROSE, Louisville.

TRUMAN E. AMES, Shelbyville.

SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

JAMES W. CRAIG, Mattoon.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

*Laws 1897, 188.

JUDGES.

WILLIAM G. COCHRAN, Sullivan.

SOLON PHILBRICK, Champaign.

WILLIAM C. JOHNS, Decatur.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.

ROBERT B. SHIRLEY, Carlinville.

OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

HARRY HIGBEE, Pittsfield.

ALBERT AKERS, Quincy.

GUY R. WILLIAMS, Havana.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

GEORGE W. THOMPSON, Galesburg.

JOHN A. GRAY, Canton.

ROBERT J. GRIER, Monmouth.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.

THEODORE N. GREEN, Pekin.

NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.

GEORGE W. PATTON, Pontiac.

THOMAS M. HARRIS, Lincoln.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.

ALBERT O. MARSHALL, Joliet.

FRANK L. HOOPER, Watseka.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

SAMUEL C. STOUGH, Morris.

RICHARD M. SKINNER, Princeton.

EDGAR ELDBREDGE, Ottawa.

Fourteenth Circuit.—The counties of Rock Island, Mercer, White-side and Henry.

JUDGES.

WILLIAM H. GEST, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
LINUS C. RUTH, Hinsdale.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry, and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
ROBERT W. WRIGHT, Belvidere.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—Joseph E. Bidwill, Jr., Fort Dearborn Building, Chicago.

JUDGES.

GEORGE A. CARPENTER,
RICHARD S. TUTHILL,
RICHARD W. CLIFFORD,
FRANK BAKER,
FRANCIS ADAMS,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
EDWARD O. BROWN,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JULIAN W. MACK,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—Charles W. Vail, Fort Dearborn Building, Chicago.

JUDGES.

JOSEPH E. GARY,*
BEN M. SMITH,
THEODORE BRENTANO,
GEORGE A. DUPUY,
ALBERT C. BARNES,
ARTHUR H. CHETLAIN,

HENRY V. FREEMAN,
FARLIN Q. BALL,
AXEL CHYTRAUS,
JESSE HOLDOM,
MARCUS KAVANAGH,
WILLARD M. McEWEN.

*Died October 31, 1906.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

JOHN L. HEALY, Judge. FRANK W. GREENAWAY, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. W. S. GLEASON, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

HOMER ABBOTT, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

W. J. N. MOYERS, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

JOHN L. HEALY, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL McWILLIAMS, Judge. HARRY L. BALLARD, Clerk.

THE CITY COURT OF MATTOON.

HORACE S. CLARK, Judge. THOMAS M. LYTTLE, Clerk.

THE CITY COURT OF PANA.

JOSIAH P. HODGE, Judge. JOSEPH R. BABCOCK, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158).

FIRST DISTRICT—CIVIL CASES.

Northwestern Building, 22 Fifth Avenue.

Court Rooms, Third, Fourth and Fifth Floors.

CHIEF JUSTICE.

HARRY OLSON—Room 402.

ASSOCIATE JUDGES.

Judge EDWARD A. DICKEE.
Judge ARNOLD HEAP.
Judge JOHN H. HUME.
Judge MCKENZIE CLELAND.
Judge THOMAS B. LANTRY.
Judge W. N. COTTELL.
Judge MANCHA BRUGGEMEYER.
Judge FREEMAN K. BLAKE.
Judge OSCAR M. TORRISON.
Judge STEPHEN A. FOSTER.
Judge JOHN W. HOUSTON.
Judge WILLIAM N. GEMMILL.

OFFICIALS.

Bailiff, THOMAS M. HUNTER—Room 300.

Clerk, HOMER K. GALPIN—Main floor, 196 Lake Street.

Jury rooms—On the second floor, room 209; on the third floor, room 310; on the fourth floor, room 401.

FIRST DISTRICT—CRIMINAL CASES.

Harrison Street Branch No. 1—Judge MAX EBERHARDT.
Harrison Street Branch No. 2—Judge JOHN R. NEWCOMER.
Desplaines Street Branch No. 1—Judge JUDSON F. GOING.
Desplaines Street Branch No. 2—Judge FRANK P. SADLER.
Maxwell Street Branch No. 1—Judge FRANK CROWE.
Hyde Park Branch—Judge W. W. MAXWELL.
Thirty-fifth Street Branch—Judge MICHAEL F. GIRTEN.
Forty-seventh Street Branch—Judge FRED L. FAKE, JR.
West Chicago Avenue Branch—Judge HOSEA W. WELLS.
East Chicago Avenue Branch—Judge ISIDORE H. HIMES.
Sheffield Avenue Branch—Judge JOHN C. SCOVILLE.

MUNICIPAL COURT.

CIVIL COURTS—OUTLYING DISTRICTS.

SECOND DISTRICT.

Judge CHARLES N. GOODNOW.

Police Station and Civil Court, 8855 and 8857 Exchange Avenue, South Chicago.

THIRD DISTRICT.

Judge EDWIN K. WALKER.

Police Court, 6347 Wentworth Avenue. Civil Court, 404 West Sixty-third Street, northwest corner Princeton Avenue, Englewood.

FOURTH DISTRICT.

Judge ADELOR J. PETIT.

FIFTH DISTRICT.

Judge HENRY C. BEITLER.

Police and Civil Courts, 1471 North Kedzie Avenue (Logan Square).

POLICE COURT DISTRICTS.

First District—Harrison and LaSalle Streets.

Second District—Maxwell Street, southeast corner of Morgan Street.

Third District—19 and 21 Desplaines Street.

Fourth District—235 West Chicago Avenue.

Fifth District—242 East Chicago Avenue.

Sixth District—838 and 848 Thirty-fifth Street.

Seventh District—Hyde Park, 5233 Lake Avenue; South Chicago, 8855 and 8857 Exchange Avenue.

Eighth District—Stock Yards, southwest corner of Forty-seventh Place and South Halsted Street.

Ninth District—Englewood, 6347 Wentworth Avenue.

Tenth District—Lake View, 687 Sheffield Avenue.

Eleventh District—Logan Square.

Twelfth District—520 Warren Avenue.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. MCCRORY.....	Adams	Quincy.
WILLIAM S. DEWEY.....	Alexander	Calro.
WM. H. DAWDY.....	Bond	Greenville.
WM. C. DE WOLF.....	Boone	Belvidere.
WILLARD Y. BAKER.....	Brown	Mt. Sterling.
JOE A. DAVIS.....	Bureau	Princeton.
F. I. BIZAILLION.....	Calhoun	Hardin.
JOHN D. TURNBAUGH.....	Carroll	Mt. Carroll.
DARIUS N. WALKER.....	Cass	Virginia.
THOMAS J. ROTH.....	Champaign	Urbana.
JAMES H. MORGAN.....	Christian	Taylorville.
HERSHEL R. SNAVELY.....	Clark	Marshall.
ALSIE N. TOLLIVER.....	Clay	Louisville.
JAMES ALLEN.....	Clinton	Carlyle.
T. N. COFER.....	Coles	Charleston.
LEWIS RINAKER.....	Cook	Chicago.
CHARLES S. CUTTING, Pro. J..	Cook	Chicago.
JOHN C. MAXWELL.....	Crawford	Robinson.
A. L. RUFFNER.....	Cumberland	Toledo.
WILLIAM L. POND.....	DeKalb	Sycamore.
FRED C. HILL.....	DeWitt	Clinton.
W. J. DOLSON.....	Douglas	Tuscola.
MAZZINI SLUSSER.....	DuPage	Wheaton.
WALTER S. LAMON.....	Edgar	Paris.
ISAAC W. IBBOTSON.....	Edwards	Albion.
MICHAEL O'DONNELL.....	Effingham	Effingham.
JOHN H. WEBB.....	Fayette	Vandalia.
H. H. KEER.....	Ford	Paxton.
T. J. MYERS.....	Franklin	Benton.
JOHN D. BRECKENRIDGE.....	Fulton	Lewistown.
W. S. PHILLIPS.....	Gallatin	Shawneetown.
THOMAS HENSHAW.....	Greene	Carrollton.
GEORGE W. HUSTON.....	Grundy	Morris.
JOHN M. ECKLEY.....	Hamilton	McLeansboro.
CHARLES A. JAMES.....	Hancock	Carthage.
JOHN H. FERRELL.....	Hardin	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson	Oquawka.
ALBERT E. BERGLAND.....	Henry	Cambridge.
JOHN H. GILLAN.....	Iroquois	Watseka.
WILLARD F. ELLIS.....	Jackson	Murphysboro.
PAUL WILLIAMS.....	Jasper	Newton.
ANDREW D. WEBB.....	Jefferson	Mt. Vernon.
THOMAS F. FERNS.....	Jersey	Jerseyville.
WILLIAM RIPPIN.....	Jo Davless.....	Galena.
THOMAS H. SHERIDAN.....	Johnson	Vienna.
FRANK G. PLAIN.....	Kane	Geneva.
DAVID B. SHERWOOD, Pro. J..	Kane	Geneva.
ARTHUR W. DESELM.....	Kankakee	Kankakee.
WILLIAM HILL.....	Kendall	Yorkville.
R. C. RICE.....	Knox	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES.....	Lake	Waukegan.
WILLIAM H. HINEBAUGH.....	LaSalle	Ottawa.
ALBERT T. LARDIN, Pro. J.....	LaSalle	Ottawa.
JASPER A. BENSON.....	Lawrence	Lawrenceville.
ROBERT H. SCOTT.....	Lee	Dixon.
ULYSSES W. LOUDEKBACK.....	Livingston	Pontiac.
DONALD McCORMICK.....	Logan	Lincoln.
ORPHEUS W. SMITH.....	Macon	Decatur.
JOHN B. VAUGHN.....	Macoupin	Carlinville.
JOHN E. HILLSKOTTER.....	Madison	Edwardsville.
JOHN S. STONECIPHER.....	Marion	Salem.
DANIEL H. GREGG.....	Marshall	Lacon.
JAMES A. McCOMAS.....	Mason	Havana.
LANNES P. OAKES.....	Massac	Metropolis.
WILLIAM J. FRANKLIN.....	McDonough	Macomb.
DAVID T. SMILEY.....	McHenry	Woodstock.
ROLLAND A. RUSSELL.....	McLean	Bloomington.
GEORGE B. WATKINS.....	Menard	Petersburg.
HENRY E. BURGESS.....	Mercer	Aledo.
LOUIS ARNS.....	Monroe	Waterloo.
JOHN L. DRYER.....	Montgomery	Hillsboro.
FRANCIS E. BALDWIN.....	Morgan	Jacksonville.
E. D. HUTCHINSON.....	Moultrie	Sullivan.
FRANK E. REED.....	Ogle	Oregon.
WILBERT I. SLEMMONS.....	Peoria	Peoria.
LEANDER O. EAGLETON, Pro. J.....	Peoria	Peoria.
MARION C. COOK.....	Perry	Pinckneyville.
ELIM J. HAWBAKER.....	Platt	Monticello.
PAUL F. GROTE.....	Pike	Pittsfield.
WILLIAM A. WHITESIDE.....	Pope	Golconda.
LYMAN G. CASTER.....	Pulaski	Mound City.
HENRY C. MILLS.....	Putnam	Hennepin.
S. LOVEJOY TAYLOR.....	Randolph	Chester.
JOHN A. MACNEIL.....	Richland	Olney.
ELWIN E. PARMENTER.....	Rock Island.....	Rock Island.
ALBERT E. SOMERS.....	Saline	Harrisburg.
G. W. MURRAY.....	Sangamon	Springfield.
CLARENCE A. JONES, Pro. J.....	Sangamon	Springfield.
WM. H. DIETRICH.....	Schuyler	Rushville.
JAMES CALLANS.....	Scott	Winchester.
CALVIN GREEN.....	Shelby	Shelbyville.
BRADFORD F. THOMPSON.....	Stark	Toulon.
JOHN B. HAY.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ANTHONY J. CLARITY.....	Stephenson	Freeport.
JESSE BLACK, JR.....	Tazewell	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
ISAAC A. LOVE.....	Vermillion	Danville.
JOHN A. LOFF.....	Wabash	Mt. Carmel.
J. W. CLENDENIN.....	Warren	Monmouth.
LEWIS BEENREUTER.....	Washington	Nashville.
JOHN R. HOLT.....	Wayne	Fairfield.
THOMAS G. PARKER.....	White	Carmi.
HENRY C. WARD.....	Whiteside	Morrison.
GEORGE J. COWING.....	Will	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will	Joliet.
W. F. SLATER.....	Williamson	Marion.
LOUIS M. RECKHOW.....	Winnebago	Rockford.
JOHN F. BOSWORTH.....	Woodford	Eureka.

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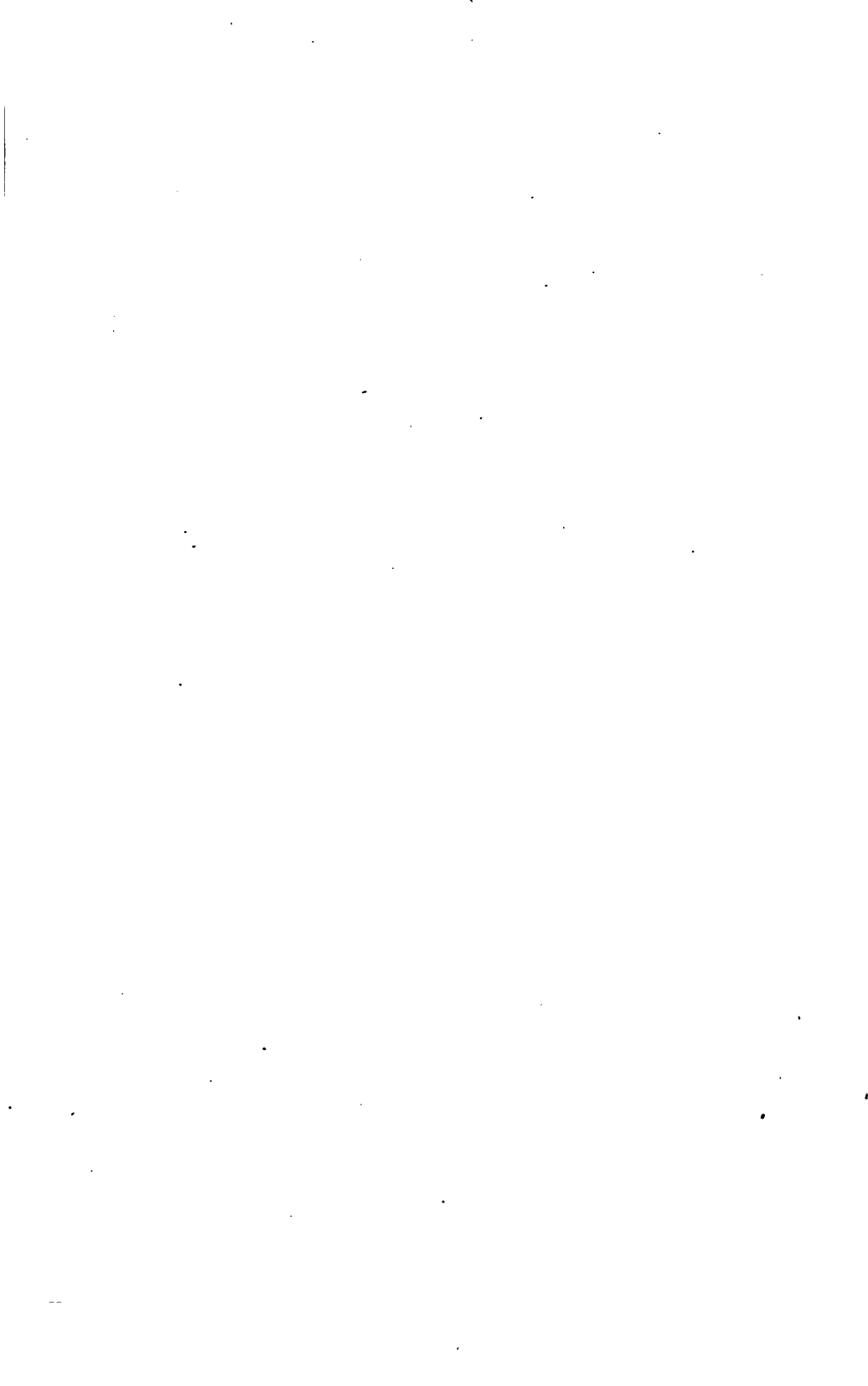
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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEARS 1905 AND 1906.

**Jefferson Theatre Program Company v. Francizek
Crejezyk, by next friend.**

Gen. No. 12,300.

1. **MINOR**—*when master liable for injury to.* Where an inexperienced minor is placed at dangerous work and undertakes to perform the same in a careful manner but is ordered by his foreman to do such work in another and more dangerous way and in consequence is injured, the master is liable.

2. **CONTRIBUTORY NEGLIGENCE**—*when not defense to action for personal injuries.* Contributory negligence is not a defense to an action for personal injuries where such action is predicated upon the violation of a statute of the State.

3. **CHILD LABOR**—*Act of June 9, 1897, pertaining to, not repealed.* The Act of June 9, 1897, concerning child labor held, not repealed by implication.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 1, 1906.

Statement by the Court. This is an appeal from a judgment of the Superior Court of Cook County in favor of appellee against appellant for \$4,000. It was entered on the verdict of a jury in an action for negligence causing personal injuries.

The declaration (as amended) contained five counts. The first alleged the possession and operation by the defendant of a printing establishment and in connection therewith of a certain Peerless Press Machine, which was driven by steam power. It alleged further the duty of defendant to use reasonable care and diligence to see that said machine was in a reasonably safe condition, so that the plaintiff might discharge the duties assigned to him thereon safely. It then avers that the defendant ordered the plaintiff, who was fifteen years old, and a servant in the employ of defendant in the printing establishment, to work at said Peerless Machine while it was out of repair and dangerous, in that "the nippers or bars being improperly fastened would become loose and would catch and stick in said machine and prevent its speedy operation, and thereby plaintiff incurred the risk of injury to his hand; all of which facts were known to the defendant and all of which facts the plaintiff was ignorant of."

The count then describes the accident as happening to the plaintiff while using reasonable care, "in the manner following: that the bars or nippers being improperly fastened, became loose, out of order, and dangerous, and would catch and stick in said machine in such a manner as to prevent the speedy pulling out of said paper or printed material out of said machine," by means of which, while the plaintiff was pulling out printed material from said press machine, the nippers or bars of said press machine caught plaintiff's left hand and the fingers were so mangled that the thumb and first finger had to be amputated.

The second count adds to substantially the same allegations the further one that the defendant negligently failed to instruct or warn the plaintiff of the danger in operating the said machine, and that the plaintiff, without fault or negligence on his part, being ignorant of the dangers of said machine, obeyed the order of the agent, foreman or vice-principal of the defendant and went to work on said machine, and the bars or nippers, for want of repair and safe condi-

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tion, failed to operate and caught and held the plaintiff's hand and mangled it.

The third count alleges the negligence of the defendant to be that it provided a dangerous machine for plaintiff to work on, "in this, that a certain spring or springs regulating, guiding, operating and moving certain nippers or bars attached to said machine, were and for a long time had been in an unsafe and dangerous condition," out of repair, etc., all of which the defendant knew and the plaintiff was ignorant of. By means of this negligence it is alleged the nippers or bars caught the plaintiff's hand while he was operating the machine.

The fourth count alleges the operation by the defendant of the printing establishment and the Peerless Press Machine driven by steam power, the employment of the plaintiff and his infancy, the knowledge of the defendant and the ignorance of plaintiff that the operation of the machine and the printing of the materials was attended by a large degree of danger, and the inexperience and unskillfulness of the plaintiff in the operation of the machine known to the defendant. It avers that it was the duty of the defendant and its agent, foreman, or vice-principal to order the plaintiff to work and operate said machine, and not to call, command and annoy the plaintiff, and thereby hurry the plaintiff, and thus cause the plaintiff's hand to be caught in the machine, but that it violated its duty in this regard and negligently ordered the plaintiff to operate said machine and did negligently call, command and annoy the plaintiff and hurry him and cause his left hand to be caught by certain nippers attached to said machine, while the plaintiff was, with due care, endeavoring to operate the machine.

The fifth count alleges the duty of the defendant to use reasonable care to provide a reasonably safe printing machine with pulleys, wheels, shaftings, tympan-rounce plates, bars or nippers, springs and appliances attached thereto, before employing and directing plaintiff to use or operate the same, and to explain to its infant servants working in said printing establishment all dangers pertaining to their

employment and how to avoid the same. It then alleges that the defendant kept and used a dangerous press machine of which certain spring or springs, pulleys, nippers or bars, with appliances attached thereto, were and had for a long time been in an unsafe and dangerous condition, worn out, defective, out of repair, loose and unfit for use, of all of which the defendant could have been aware by due diligence, but of which plaintiff was ignorant.

Further, that the plaintiff being an infant under sixteen years of age, ignorant and inexperienced in the operation of dangerous machinery was a servant in the employ of defendant working in said establishment under the direction of a certain vice-principal of said defendant, and while he was so employed the defendant, *contrary to the statute in such case made and provided*, negligently directed, permitted, allowed, employed and caused the plaintiff to use and operate said machine, which machine was dangerous for the plaintiff to use, and negligently provided machinery in a dangerous condition for the use of the plaintiff, and failed to explain to the plaintiff or to warn him of the dangers of operating said Press machine, and while the plaintiff, with due care, was engaged in operating said machine and was inexperienced and unaware of its dangerous condition, the nippers or bars, with the appliances attached thereto, "by reason of the dangerous condition of said machine, herein before set forth, and by reason of being so employed in said workshop or printing establishment, and by reason of the careless and negligent misconduct of the defendant aforesaid, then and there caught the plaintiff's hand" and crushed it.

To these various counts the defendant filed a plea of not guilty. After the verdict of the jury, the defendant's motion for a new trial and in arrest of judgment were denied, and judgment entered upon the verdict.

In this court it is assigned for error that the verdict and judgment are contrary to the law and the evidence, and that the verdict was excessive, that the trial court erred in rulings on the admission and exclusion of evidence, in not

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taking the cause from the jury by a peremptory instruction in favor of the defendant at the close of all the evidence, in permitting counsel for the plaintiff, during his argument to the jury, to make statements concerning an alleged statute of the state, in giving and refusing and modifying respectively certain instructions, in denying a motion for a new trial and in arrest of judgment, and entering judgment upon the verdict.

HORTON & BROWN, for appellant.

F. W. JAROS and FRANCIS J. WOOLLEY, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The evidence in this case shows the following state of facts: The plaintiff was a boy fifteen years and one month old when the accident which is the basis of this action happened, on June 30, 1902. In January, 1902, he had first worked on a printing press. He was then employed by the Badger Printing Company, but was occupied with duties other than printing for about half the time. The printing press that he worked on was a Chandler & Price press, a variety of the type known as "Gordon" presses, and the work he did on the press was the printing of envelopes, cards, bill-heads and like work.

After two months' employment with the Badger Printing Company he went to work for five days feeding a Chandler & Price press for the Phantis Printing Company, the printing being of a like character. From there he went to the printing establishment of the appellant, the defendant below. This was in the latter part of March, 1902. In a conversation with the superintendent when his employment began, the plaintiff was asked if he had worked in feeding a Gordon press. He answered that he had, a Chandler & Price press for about two months. By the defendant he was employed to sweep the establishment and to feed a Peerless press, another variety of the Gordon press. Defendant's expert witness at the trial said this was a more difficult press for a boy to feed than a Chandler & Price press, because

the sheets to be printed in the Peerless press have to be laid on the platen while it is an inclined plane, whereas in a Chandler press they are laid on a flat surface, the platen coming up farther from the form for that purpose. The Peerless press at which plaintiff was put to work by defendant opened and closed as it was running at the time of the accident every three seconds, and there was no way for the feeder to regulate the speed. Of course it closed with force enough, if allowed to complete its motion, to cut off a person's fingers caught between its jaws, that is, between the platen and the form. The plaintiff was evidently, as appears from the record, of scant height to stand at the press and reach in between the platen and the form accurately to adjust the sheets to be printed in their proper position on the platen, if there was any difficulty or slip in the ordinary handling, making necessary such an adjustment.

The place or position in which the sheet to be printed was to be laid was indicated by some obstructions (called guides) fastened to or into the platen or bed against which the bottom edge and one of the side edges of the paper would rest, thus insuring its position being exactly correct when the platen brought it up against the form which held the type.

Two thin strips of elastic steel about an inch wide fastened to a turning bar at the throat of the machine between platen and form, generally called nippers in the testimony in this case, held the paper in place as it approached and receded from the form. They were so placed of course that they fell on such portions or margins of the paper to be printed as did not have to meet the type.

At the left of the press was a lever called a throw-off lever. By working this lever, the handle of which was convenient to the left hand of the feeder, the motion of the platen toward the form was checked at about half an inch or more from their point of meeting, and the press opened again as though it had printed. This throw-off is therefore used when the sheet to be printed is in any way out of the exact position it should occupy, as shown by the guides, to prevent the press from actually closing and thus printing until the sheet is fully

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and precisely adjusted, when the lever being again moved, the platen will come to the form and the impression be made. It is obvious therefore that in any case where the adjustment requires something more of manual action than can be used altogether outside of the jaws of the press, the only practically safe method of work, considering the speed with which the machine moves, is to throw off the lever before inserting the hand.

The first job on this Peerless press given to the plaintiff was printing envelopes; afterwards he printed programmes for the theatres, and this employment, with other duties around the establishment, had lasted for two months at the time of the accident.

On the day in question he was during the forenoon engaged in feeding the press "various pieces of light work," but in the afternoon, the foreman of appellant called him to print the red ink characters on about a hundred price lists on which the impressions in black ink, constituting the great bulk of the contents of the sheets, had been made. This is called a re-register job. The sheets must obviously be placed with precision or they will be spoiled and the work already done on them wasted. The bottom of the sheets was rough. The pressman had arranged the form and the guides and all that the plaintiff had to do was the feeding. The guides were ordinary brass pins, which had been fixed in the platen. Previously, when plaintiff had fed the press the guides had been quads or slugs of lead fastened to the platen by paste, and this is their usual form. The plaintiff testified that quads being thicker than pins, the sheets are not so likely to get caught on them in an inaccurate position, and this was not contradicted. He further testified that the guide pin at the side stuck out so little that the sheet to be printed had to be pressed down to get it under the head of the pin.

Plaintiff, although told by the foreman that the job was a rush job and that he was to get it off as quickly as he could, was careful enough of his own safety and of the accuracy and neatness of the work, to pull the throw-off lever

towards him frequently,—“every other sheet or so,” a witness working next to him testified, and prevent the press from closing or printing until he had time to adjust the paper. Of course this prevented any danger of his hand being caught. When the sheet was precisely adjusted, (it being more difficult to secure such adjustment on account of the rough bottom edge of the sheets than it would have been had they been smooth), the plaintiff would throw the lever back and the press would close. As each sheet was printed he would take it out and put in another.

In this way he had finished fifty or sixty of the hundred sheets to be printed, when the foreman came along and with profanity ordered him to hurry—told him that people were waiting for the job down stairs, that it was a rush job, that he was to let the throw-off lever alone and go ahead feeding, and let the press come together every time the platen moved. The plaintiff answered; he testifies, that he didn't know anything about the job, that it was a close register job, and that he couldn't feed any faster. Being thus ordered to go on faster, however, the plaintiff attempted, immediately after the foreman had passed on, to adjust with his left hand a sheet which had stuck on the left hand pin guide at the bottom without pulling the lever and thus giving himself time to do it safely. Before he could get his hand out, the platen and form had come together, and in their coming together cut off his thumb entirely, crushed his forefinger so as to render amputation necessary, breaking also the bones in the next two fingers.

Postponing for the moment the consideration of the sufficiency of the allegations of the declaration to support a judgment for the plaintiff on these facts alone, they seem to us to show that by such a judgment substantial justice has been done, irrespective of any question of defects in the press. It appears that the plaintiff, a very young and small boy to work at machinery of this kind, with no great experience and not even continuous employment at any machine, was set to do a particular job requiring precision and accuracy of handling, that he was doing it in the only way in

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which it could practically be done safely by a boy of his size and age, that he was savagely and profanely ordered to hurry it in just the way which prevented his taking the precautions necessary for his safety, that he remonstrated, but endeavored to obey orders and was in consequence mutilated for life.

It is true that there are many cases in which a minor has been held barred from recovery for personal injuries because of contributory negligence, and it is true that to a person looking at the matter after the event, it seems very imprudent for anybody to have put his hand into the jaws of that press to place a sheet accurately; but in view of his youth and inexperience and of his attempt to do the work with care both for himself and it, of the unreasonable rebuke given him for that very care, and of his attempt to obey orders, it is not possible to say that all reasonable minds must agree that the plaintiff must have seen and appreciated the danger. If not, then if the negligence of the defendant be assumed, the question of contributory negligence was one for the jury, and under instructions certainly as favorable in this particular to the defendant as could be justified in this case, they answered it in favor of the plaintiff. We do not think such an answer unreasonable or contrary to the evidence.

But beyond this, we think that the contention of the appellee is well taken that contributory negligence is not a defense in this case. There was a statute of the State in force when this accident occurred, and at all times since, which forbade the employment of any child under the age of sixteen years at any hazardous employment which was dangerous to his life or limb; and the question whether feeding this press, opening and closing twenty times a minute with force sufficient to cut one's hand off if caught within it, was so dangerous, was for the jury. If it was an employment dangerous or "extrahazardous" to this boy's hands, "the employment was unlawful, the injury resulted from the unlawful employment and while appellee was engaged in doing the precise thing that appellant directed him to do, and to

hold that contributory negligence under such circumstances is a defense, would be to defeat one purpose of the statute." *American Car and Foundry Company v. Armentraut*, 214 Ill., 509.

The argument that the provision of the law of June 9, 1897, concerning child labor, that "no child under the age of sixteen years shall be employed or permitted or suffered to work by any person, firm or corporation in this State at such extrahazardous employment, whereby its life or limb is in danger," was repealed by the Act of May 15, 1903, concerning the employment of children which provides that children under the age of sixteen years shall not be employed at certain specified occupations or in "any other employment that may be considered dangerous to their lives or limbs," and concludes by repealing a specific Act of June 17, 1891, and "all other acts and parts of acts in conflict with this act,"—is without merit. Appellant's contention is that the second Act being a revision of the whole subject of the former one wiped out all rights depending on the former one, and supplied none except to persons falling under its provisions after its passage. But there are two valid answers to this, both based on chapter 131 of the Revised Statutes of Illinois. Section 2 of that chapter, enacting that "The provisions of any statute so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provision," is plainly applicable; and so also is Section 4, "That no new law shall be construed to repeal a former law * * * as to any right accrued or claim arising under the former law," etc. The decision in *Vance v. Rankin*, 194 Ill., 625, is easily distinguished from the principle involved in the present case. A statute expressly repealing a statute conferring jurisdiction upon certain boards and giving a special remedy to persons desiring certain action, was specifically repealed without a saving clause, and the Supreme Court held that it completely obliterated the prior law. That is far from this case.

We think it was a proper question for the jury whether the defendant in this case was not guilty of negligence in

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setting the plaintiff to feed the machine without special instructions as to its danger, and in hurrying him with orders to cease the care which he was actually exercising for himself, and that neither the contributory negligence of the plaintiff, if it existed, or an alleged assumption of risk can be availed of as a defense.

We think also that although the declaration in the cause seems drawn principally with reference to an alleged defect in the machine at which plaintiff was working, its fourth count, the second additional count filed April 2, 1903, which alleges that the operation of the machine was attended with a large degree of danger, and charges the defendant with carelessly and negligently ordering the plaintiff to work at and operate said machine, and carelessly and negligently calling, commanding, annoying and hurrying the plaintiff and causing his left hand to be caught by certain nippers attached to said machine, by means and in consequence of which the plaintiff's hand was injured, etc., is sufficient, certainly after verdict, to sustain the verdict and judgment under the evidence, without reference to a defect in the machine. The nippers which are in this and the other counts alluded to, are shown by the evidence to have caught the plaintiff's hand. This is not only shown by his testimony, but the evidence of the scar on the plaintiff's hand strongly tends to confirm it. There is force in the suggestion that if the nippers suddenly fell upon the feeder's hands in the rapid movements he was forced to make, he would be delayed by the occurrence in removing the hand even if the nippers did not bind it tightly.

There certainly seems ground in the construction of the machine as described, and in the testimony of the expert produced by the defendant, for the contention of appellant that the nippers, even if defective in their action by reason of the absence of or defect in the mechanical appliances regulating it, could not by themselves have bound with any great degree of strength the plaintiff's hand; but this was after all a matter for the jury, with all the evidence, including the press and the hand of the plaintiff, before them,

and we should not be inclined to disturb the verdict and judgment even if they depended upon a finding that the nippers did closely catch and strongly bind the plaintiff's hand.

There was evidence before the jury that the nippers did not work properly, that they sometimes fell on the platen when they should not have done so, that the spring which ruled their action was defective, and that defendant, through its general foreman, was appraised of the defect.

The objections made to the admission of evidence we do not think are well taken. The evidence concerning the string and the bolt attached to the bar on which the nippers were fastened was relevant as bearing on the fact of knowledge on the part of the defendant that the usual appliances for regulating the action of the nippers were defective, and the evidence that the edge of the sheets to be printed was rough, was relevant to the question of the time required to adjust each sheet properly, and to the negligence of the defendant in requiring greater haste than the plaintiff was making in his work. *Howe v. Medaris*, 183 Ill., 288, is distinguishable in this respect, for there the cause of action, the court says, was based solely upon the allegation of defective machinery, and the plaintiff admitted that the accident could not have happened if the machine had been working properly.

The testimony offered that the spring was entirely missing, we think was admissible under several counts, and certainly under the fourth. If the evidence of the remark of Miller to the pressman, "the foreman over the boys," that "them boys are liable to be cut, their hands hurt on them presses," was objectionable, which we do not decide, the evidence was not prejudicial. If the verdict and judgment can be sustained on the inherent danger of the employment for this boy, the testimony added nothing to what the jury had otherwise before them; if they can be sustained only on the defective condition of the machine in relation to the nippers, the defect and notice of it to the defendant and its knowledge of it, were otherwise clearly shown to the jury. The

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illustration offered by the plaintiff in connection with his testimony under oath relating to his ability to pick up objects, was within the discretion of the trial court.

Nor is there any argument on the assignment of error that the verdict was excessive.

The objections to the instructions do not seem to us forcible. Instruction 3 has been approved by the Supreme Court, and the objections urged to it are technical and subtle.

Instruction No. 23 as offered seems to us to have been properly modified, and instruction 24 does not direct a verdict but was a proper *addendum* to instruction 23, in explanation of parts of it. We think the defendant has no reason to complain that by the instructions taken together the law affecting this case was not declared fairly and favorably to it.

The judgment of the Superior Court is affirmed.

Affirmed.

City of Chicago v. Kittie Gilmore.

Gen. No. 12,333.

1. NEW CAUSE OF ACTION—*when amended declaration sets up.* Where the original declaration sets up a breach of duty in failing to maintain a sidewalk at a place named in a reasonably safe condition, an amended count which sets up a breach of a like duty at a different place, constitutes a new cause of action.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in this court at the March term, 1905. Reversed. Opinion filed March 1, 1906.

Statement by the Court. This is an appeal by the city of Chicago from a judgment rendered November 19, 1904, by the Superior Court of Cook County against it for \$3,000 in favor of Kittie Gilmore. The judgment was on the verdict of a jury, in an action for personal injuries received by the plaintiff, Kittie Gilmore, through a defective public sidewalk under the control of the city of Chicago.

The action was begun by *praecipe* to the summons February 9, 1901. The summons to the March term of the Superior Court was served upon the appellant February 19, 1901. The original declaration was filed March 30, 1901. It alleged that the defendant, the city of Chicago, before and on February 4, 1900, was possessed of and had control of a certain public sidewalk "*on the north side of a certain public street called Thirty-eighth street at and near to the intersection of said Thirty-eighth street with Princeton avenue and between Princeton avenue and Shields avenue in said city in the county aforesaid.*" It then alleged the duty of the defendant to maintain the same in reasonably safe condition and its neglect of that duty in allowing certain boards in said sidewalk to be loose and certain boards to be removed, whereby the plaintiff while passing along said sidewalk with reasonable care had her left foot and leg caught in an opening in said sidewalk and was badly injured. To this the defendant filed a plea of not guilty March 25, 1901.

September 31, 1904, by leave of court an additional count was filed, alleging that on or before February 4, 1900, the defendant was possessed and in control "*of a certain public highway known as Thirty-eighth street, at or near the intersection of Thirty-eighth street with Princeton avenue and between Princeton and Shields avenues in the city of Chicago,*" and further alleging its unsafe condition, in that certain boards "*of the sidewalk of said street*" were permitted to be and remain loose and removed, whereby the plaintiff was thrown down to the ground and injured.

October 5, 1904, the city filed a plea of not guilty to this count also.

The same day by leave of court the plaintiff amended both the original declaration and the additional count, by striking out the words "Princeton avenue" wherever the same occurred, and inserting instead "Stewart avenue." The first or original count then described "the certain public sidewalk" as "*on the north side of a certain public street called Thirty-eighth street at and near to the intersection of*

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said *Thirty-eighth street with Stewart avenue and between Stewart avenue and Shields avenue in said city.*" And the additional count describes the "*locus*" as "*a certain public highway known as Thirty-eighth street at or near the intersection of Thirty-eighth street with Stewart avenue and between Stewart and Shields avenues in the city of Chicago.*"

To the declaration as thus amended, the city, October 6, 1904, filed two pleas, the first "Not guilty," the second, the two years' Statute of Limitations.

October 22nd, the plaintiff joined issue on the plea of not guilty and demurred generally to the plea of the Statute of Limitations. October 24th the court sustained the demurrer. The cause went to trial on the general issue November 9, 1904.

The trial court refused to take the case from the jury by an instruction to find for the defendant at the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence.

After the verdict a motion for a new trial was made by the defendant and overruled by the court, judgment was then entered on the verdict and this appeal taken.

In this court it is argued by appellant that the trial court erred in sustaining the demurrer of the plaintiff to the plea of the Statute of Limitations filed to the amended declaration October 6, 1904, in not taking the case from the jury by the peremptory instruction asked, in not sustaining the motion for a new trial, and in entering judgment upon the verdict, it being contended by appellant that the verdict was contrary to the law and the evidence.

JOHN F. SMULSKI, City Attorney, and FRANK D. AYERS, for appellant; EDWARD C. FITCH and EDWARD S. DAY, of counsel.

THEODORE G. CASE, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

In this case the demurrer to the Statute of Limitations of two years should have been overruled. A new cause of

action was introduced by the amendment of the declaration on October 5, 1904, and it was a personal injury sustained in 1901. The defendant by the declaration before it was amended was charged with having the duty to maintain in reasonably safe condition a public sidewalk on the north side of Thirty-eighth street near the intersection of Princeton avenue and Thirty-eighth street, and between Princeton avenue and Shields avenue in Chicago, with having neglected *that* duty, in consequence of which the plaintiff had her leg caught in *that* sidewalk and was injured. This was the purport of both counts.

After the amendment a different duty was alleged as binding the defendant. It was to maintain in reasonably safe condition a public sidewalk on the north side of Thirty-eighth street, near the intersection of Stewart avenue and Thirty-eighth street and between Stewart avenue and Shields avenue in Chicago. It was after the amendment *this* duty the defendant was charged with neglecting and through *this* sidewalk that the defendant was alleged to have fallen.

Unless these descriptions of the sidewalk in question are tantamount to each other, we cannot see how these are not two distinct causes of action.

A recovery on the original declaration would not bar the cause of action set up in the amended one, nor would the same evidence support both declarations. The duty of the defendant is different, its neglect is different, the very accident itself is different. To fall through a defective sidewalk in Chicago in one place is not to fall through a defective sidewalk at another place.

The appellee urges that the amendment made no new cause of action, because the testimony showed that there is in no intersection of Princeton avenue and Thirty-eighth street and no sidewalk between Princeton avenue and Shields avenue on the north side of Thirty-eighth street. That is immaterial. The plaintiff charged explicitly that there was such a sidewalk, that it was the city's duty to keep it in good condition, and that by reason of a neglect of that duty the plaintiff was injured.

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If the city could have shown there was no sidewalk there, it would have been a good defense for it to that action. Its being charged in that action with neglecting to keep up a non-existent sidewalk certainly ought not to put upon it, in order to make a defense, preparation of proof that no existent sidewalk in the city was defective.

It might be possible for "the north side of 38th street between Princeton and Shields avenues near the intersection of Princeton avenue and 38th street" to be also "the north side of 38th street between Stewart and Shields avenue and near the intersection of Stewart avenue and 38th street." But without evidence it could not be so considered on the demurrer to the Statute of Limitations, and the demurrer should have been overruled, leaving to the plaintiff, if so advised, to reply to the plea, and aver in some form the identity of the description in the amended declaration with that in the original one. The evidence in this case on the trial as a matter of fact showed that the descriptions were not identical, but of entirely distinct places.

Princeton avenue is a block east of Shields avenue, and Shields avenue a block east of Stewart avenue, and all three run north and south. Thirty-eighth street runs east and west at right angles with them. It would seem that neither Princeton nor Shields avenue ran through Thirty-eighth street at the time of the accident, but either Shields avenue alone or both Shields and Princeton avenues run into it. The material matter is that the north side of Thirty-eighth street between Princeton and Shields avenues cannot be the north side of Thirty-eighth street between Shields avenue and Stewart avenue, Princeton avenue being east and Stewart avenue west of Shields avenue.

Appellee also insists that the amendment did not set out a new cause of action, because the place in which the accident occurred is immaterial. It is argued that the place having been averred inaccurately, the proof would have made a variance had the amendment not been made, but as the particular description of the place or *locus in quo* is surplusage and immaterial, an amendment may be made at any time before

trial and the variance thus avoided without stating a new cause of action.

The "*locus in quo*," it is urged, is only essential in actions for damages to real estate and never in actions for personal injuries which are transitory. To justify this contention appellee cites Chicago City Railway v. McMeen, 206 Ill., 108, where the distinction between the question whether the facts proved under an amendment are at variance with the allegations of an original declaration and the question whether such amendment introduces a new cause of action, is pointed out. There is, without doubt, such a distinction, but that is not pertinent here.

The court in Chicago City Railway Co. v. McMeen held that an amendment to a declaration against the Chicago City Railway for injuries resulting to McMeen from a rear end collision of two of its cars, in one of which he was a passenger, by which amendment the place of the accident was changed from State street to Cottage Grove avenue, did not state a new cause of action because, as the court said, "although varying the details of place, the substantive claim counted upon precisely the same rights, duties and violations as were alleged in the original declaration."

This in our opinion is not true in the case of the amended declaration in the case at bar.

Distinguishing cases cited by appellant in Railway Co. v. McMeen, the Supreme Court does not, as counsel argue, emphasize the difference between injuries to real estate and injuries to the person, but the difference between cases where the *locus in quo* is essential to and of the substance of the action and cases where it is not.

To say that the correct description of the *locus in quo* is not essential or material in cases like the one at bar, is to say that a declaration against the city, alleging generally an accident to a plaintiff on a sidewalk within the city limits, would contain all the information necessary or essential to be stated in the pleading. This is not so. Use of the argument *ab inconvenienti* is not needed to demonstrate that in the case of an injury by a municipal corporation's neglect

to keep in repair a sidewalk within its limits, the fundamental principle of pleadings that its object is to inform the parties respectively of the case they have to meet, is inconsistent with any such proposition. Whether the action is for damage to real estate or to the person, when "the *locus in quo* is legally essential and of the substance of the action" (which is the language of the Supreme Court in the McMeen case), a damage in that *locus* will state a new cause of action. This is the underlying principle in Wisconsin Central Railroad v. Wieczorek, 151 Ill., 579, and of Derragon v. Rutland, 58 Vermont, 128, discussed in the McMeen case, and it is also the principle involved in the opinions of both the Appellate and Supreme Court in Town of Cicero v. Bartelme, 114 Ill. App., 9, and 212 Ill., 256. In the Appellate Court, MR. JUSTICE BAKER held the demurrer to the plea of the Statute of Limitations to the additional count properly sustained, because the *locus* set forth in that count was the same as that described in the original declaration, and in the Supreme Court, MR. JUSTICE HAND was even more explicit in the same sense.

If the cause of action set forth in the amended declaration in the case at bar was a new one, it is plain that the trial court erred in not overruling the demurrer to the Statute of Limitations, and erred in not taking the cause from the jury.

The appellee says that the record fails to show that the appellant took any exception to the ruling of the court sustaining the demurrer. No exception is necessary to such a ruling on the pleadings. Hamlin v. Reynolds, 22 Ill., 207. She also says that the record does not show that the appellant stood by its plea. This is presumed if it takes no steps from which a waiver or abandonment of it is to be inferred, such as asking to amend or to plead over. Bemart v. Union Central Life Ins. Co., 203 Ill., 439, is authority for both these propositions.

It was not to be expected, of course, that the trial judge would, after sustaining the demurrer to the plea of limitations, take the case from the jury on the same ground on which he was asked to overrule the demurrer; but as appel-

lant stood by its plea, if there was error in sustaining the demurrer, it was repeated in the refusal of the peremptory instruction.

Our holding as to the effect of the plea of the Statute of Limitations renders it unnecessary for us further to discuss the case. The statute being, as we hold, a bar to this action, we shall reverse the judgment without remanding the cause, but with a finding of facts.

Reversed.

**The People of the State of Illinois, ex rel. William
E. Dodson, v. The Board of Trade of
the City of Chicago, et al.**

Gen. No. 12,302.

1. **MANDAMUS**—*certainly required of answer in.* "Certainty to a certain intent in every particular" is not required of an answer in *mandamus*; it suffices if the answer without ambiguity or evasion responds to and denies the assertions of the petition.

2. **MANDAMUS**—*when defects of answer in, cannot be urged upon general demurrer.* The sufficiency of a denial contained in an answer cannot be raised by general demurrer.

3. **BOARD OF TRADE**—*when courts will not interfere to prevent forfeiture of membership in.* The courts will not interfere to prevent forfeiture of a membership in the board of trade where such forfeiture has been made pursuant to the by-laws in force at the time of the acquisition of such membership.

4. **BOARD OF TRADE**—*by-law as to payment of dues construed.* A by-law of the board of trade involved in this case which pertained to the payment of dues, construed to require the payment of dues by a member during his period of suspension.

Mandamus proceeding. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 1, 1906.

H. J. TONER and JOSEPH I. KELLY, for appellant.

HENRY S. ROBBINS, for appellees.

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MR. JUSTICE BROWN delivered the opinion of the court.

The relator in this case was suspended from "the privileges of membership" in the Board of Trade of the appellee under Section 9 of Rule IV of said Board, on December 26, 1893, for ten years. January 4, 1904, he demanded of the "President, Secretary and Board of Directors of the Board of Trade of Chicago, and of the Board of Trade" that they should immediately replace his name on the roll of active members of the Board and recognize him as a member thereof. He was under date of January 9, 1904, informed in writing by George F. Stone, Secretary of the Board, that this demand had been duly presented to the Directors and that he as Secretary had been instructed to refer the relator to section 3 of rule X of the Board, and to state that the privilege of membership which stood in the name of William E. Dodson had expired under the provisions of said Section, for failure to pay dues for the year 1894.

Thereafter, on April 12, 1904, leave having been granted by the Circuit Court of Cook County to the relator to do so, he filed a petition in that court praying for a peremptory writ of *mandamus* to be directed to the Board of Trade and its Secretary, commanding them to restore him to all the rights and privileges of membership in said Board of Trade, and to place his name upon the roll of members of said Board, and to accord to him all the rights and privileges of membership; and praying also that he be allowed his costs and damages in that behalf sustained.

The Board of Trade and its Secretary appeared by attorney and answered the petition, alleging "for return and answer" first, that the petition did not state a case in which the court could or should issue a writ of *mandamus*, and asking the same benefit and advantage from said objection as though they had interposed "a *concilium* or demurrer" to the petition, and then setting out certain rules of the Board of Trade, including section 9 of rule IV and section 3 of rule X, and averring that the relator had refused to comply with section 3 of rule X, and had not paid his annual assess-

ment for the year 1894, by reason of which his membership was forfeited and cancelled, and all his rights and privileges as a member thereafter ceased.

The answer also set up that before the year 1894 had expired, respondents caused notice to be given to the relator, by posting his name on the bulletin board in the exchange room of the Board, and that afterward the following correspondence passed between the parties at the dates given:

“CHICAGO, DEC. 8TH., 1894.

Mr. George F. Stone, Sec'y., City:

DEAR SIR:—Will you kindly let me know the amt. of dues and assessments that now stand against my membership to the Board of Trade and how long a time I have to pay them before the membership is declared forfeited.

Yours truly,

W. E. DODSON,
28 Jackson Street, Chicago, Ill.”

“SECRETARY’S OFFICE,

DECEMBER 10, 1894.

Mr. W. E. Dodson,

No. 28 Jackson St., Chicago;

DEAR SIR:—Yours of the 8th inst. is received. I inclose an extra notification of the amount of dues this year. The dues of the year 1894 must be paid during the present fiscal year, which closes on the 7th day of January, 1895. These dues must be paid on or before that date without fail to save the membership from cancellation and forfeiture under the rules of this organization.

Yours very truly,

GEO. F. STONE,
Secretary.”

The answer then denies various allegations of the petition, among them the statement that relator was under no obligation to pay dues and assessments to the Board of Trade during his suspension, and the statement that section 3 of rule X is not justified under the charter and by-laws of

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the Board of Trade. It alleges that by the charter of the corporation it is provided that it shall have the right to admit and expel such persons as it may see fit, in manner to be prescribed by its rules, regulations and by-laws, and that the relator, before becoming a member of the Board of Trade, signed an agreement which was in full force and effect at the time the relator's membership was cancelled, as follows:

"We, the undersigned, members of the Board of Trade of the City of Chicago, do by our respective signatures, and by virtue of our membership in said corporation, hereby mutually agree and covenant with each other and with the said corporation that we will in our actions and dealings with each other and with the said corporation be in all respects governed by and respect the rules, regulations and by-laws of the said corporation, as they now exist or as they may be hereafter modified, altered or amended."

This answer was verified by George F. Stone. To said "return and answer" the said respondents filed a general demurrer. After hearing the demurrer the Circuit Court entered an order overruling the same, reciting that the relator elected to stand by his demurrer and refused to plead over, finding that the answer was sufficient in law, and that the relator was not entitled to the relief prayed for in his petition, finding also the issues in favor of the respondents, and dismissing the petition with costs.

The relator prayed an appeal to this court, in which he has assigned as error the overruling of his demurrer to the respondents' answer, and the finding of the issues and the judgment for the respondents.

The contention of the relator is that he was unwarrantably and unjustifiably deprived of his membership: First, because he had violated no rule or by-law of the Board and was in no default. Section 3 of rule X, he claims, did not apply to him when under suspension. Secondly, because, assuming section 3 of rule X to be otherwise applicable to him when under suspension, yet in so far as it provides for deprivation of membership without notice and opportunity

to be heard, it is "unreasonable," "unwarranted by the charter," "contrary to public policy," and "contrary to the law of the land," and therefore void as against him. It is also unreasonable and therefore void, he claims, because it places the power of forfeiture in the hands of the Secretary, although it makes such forfeiture depend upon facts, the existence of which the Board of Managers or Directors alone can have the power to determine.

The relator further contends that if the cancellation of his membership were thus unwarrantable, either because there was no by-law of the Board applicable to his authorizing it, or because a by-law purporting to do so was unreasonable, illegal and void, said cancellation was illegal, and being so illegal, should be set aside by the peremptory writ of *mandamus* for which he asks, *mandamus* being the proper remedy to restore a member of a corporation improperly removed, and a remedy which springs from the visitatorial power of the State over all its corporate creations.

As incidental to the main contentions we have outlined, the relator insists that the return or answer to his petition is not certain enough for a common law pleading, that as the pleadings in *mandamus* are at common law, all things in them not expressly denied are admitted, and that the application of this rule involves an admission by the respondents that the relator, as alleged in the 16th paragraph of his petition, although entitled to notice of the making of the alleged assessment of 1894, received none.

Although not in our view an essential matter in the case, this last contention may be at once disposed of. By our statute and practice, the same rules of pleading are applicable to proceedings in *mandamus* as to other suits at law. The doctrine that "certainty to a certain intent in every particular" is necessary in a return or answer, has been generally relaxed, and it suffices if the answer without ambiguity or evasion responds to and denies the assertions of the alternative writ, or of the petition which, in our practice, takes its place. Merrill on *Mandamus*, sec. 274. In the case at bar the objection really is that the statement in the answer

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that "respondents deny the allegations and each of them contained in the 16th paragraph of the Relator's Petition," is not a sufficient denial, because it does not repeat the words of said allegations and traverse them. If the denial is too general for a truly artificial pleading at common law (which we do not decide), the objection should have been taken by a special demurrer, not urged under a general one. The demurrer admits only what is well pleaded, it is true, but "well pleaded" in this connection does not mean pleaded with the highest degree of technical accuracy, but means, substantially alleged and relevant to the issue.

The main contentions in the cause the appellant's counsel press with great force and ability.

It is not to be denied that it seems, as counsel contend, just, that in an incorporated association where the memberships have a high money value, the courts should scrutinize forfeitures more closely than in the case of "clubs, churches, volunteer fire departments, etc.," and that there is a distinction in reason between the manner in which corporations or associations formed for some political, ethical or religious cult may properly treat its memberships, and that in which purely commercial exchanges should treat them. It was in view of these considerations, doubtless, that this court, by a divided court, however, in *Nelson v. The Board of Trade*, 58 Ill. App., 399, held that a demurrer should have been overruled to a petition for *mandamus*, which alleged that the petitioner was improperly suspended indefinitely from the Chicago Board of Trade, and further alleged that the charge on which he was so disciplined did not constitute an act made punishable by the rules of the Board, and consequently was not sufficient to confer jurisdiction on the directors to remove him. The Appellate Court thought that the specifications in the charge defining the alleged act negatived the proposition that the act was within the purview of the disciplinary rule, and therefore that it was proper for the courts to intervene. But when the cause reached the Supreme Court (162 Ill., 431), after again coming through this court (62 Ill. App., 541), which had then upheld a demurrer to an answer filed

to the petition, the Supreme Court said: "The petition showed a case with which the Court was powerless to interfere and the demurrer should have been carried back to it," and thus disapproved both judgments of this court. It said also, among other things, that the status of the Board of Trade had been determined by the Supreme Court in numerous cases, and it had been held to be merely a voluntary organization, although incorporated under an Act of the General Assembly; that the corporation was not bound to admit any person to its membership, that the relator voluntarily became a member, and by his contract was bound to abide by the rules and regulations of the Board; that the courts would never interfere to control the enforcement of by-laws of such associations, but would leave them to enforce their rules and regulations by such means as they might adopt for their government. To these propositions the court cites *People ex rel. Rice v. Board of Trade*, 80 Ill., 134.

In that case the court certainly placed the Board of Trade of Chicago in the same class as churches, masonic bodies, Odd Fellows and temperance lodges, and impliedly at least declared that the relator had no such interest or legal right to membership in the Board as would be regarded by a court of justice, and that the courts would, under no circumstances, interfere to restore an expelled member by *mandamus*. So the Supreme Court of Wisconsin in *State v. Chamber of Commerce*, 47 Wis., 670-682, construed the language, and so did the text book writer on Stock Exchange—cited by appellant's counsel. Indeed, counsel for appellant rely rather on their ability to point out modifications subsequently made by the Supreme Court in the doctrine announced in the *Rice* case, than on their ability successfully to distinguish the case itself, which they term "anomalous," and "out of plumb." Especially it is urged that *Ryan v. Cudahy*, 157 Ill., 123, repudiates the implications of which we have spoken, which might be gathered from the language of the *Rice* case.

The opinion of the majority of the Appellate Court in *Nelson v. Board of Trade*, 58 Ill. App., 399, is in agreement

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with this position, but Mr. JUSTICE GARY, in his dissenting opinion, points out that the Supreme Court in *Ryan v. Cudahy*, denied that it was qualifying its former decisions.

In the situation in which the question is left by the decisions of the Supreme Court of the State, we do not think that upon the ground that section 3 of rule X is "unreasonable, unwarranted by the charter" and "contrary to public policy," we could adjudge it void and require the restoration of relator, even if we agreed that all these criticisms of it were just.

We are not unmindful that in *Board of Trade v. Nelson*, 162 Ill., 431-438, which we have before cited, one ground given for refusing to interfere was, that "The by-law in question was not unreasonable, immoral, contrary to public policy nor in contravention of the laws of the land."

But for the contention that in cases where the by-law or rule of the Board is unreasonable and contrary to public policy, the courts may interfere by *mandamus*, the Supreme Court, in the present state of the decisions, is the only appropriate tribunal. We are obliged, as we think, by the utterances of that court to hold to the contrary.

It is not necessary, however, for us to decide whether we could in any case cancel an amotion and restore a member of the Board of Trade by *mandamus*. We shall decline, for the reasons above given, to consider the reasonableness or justice of the rule under which the forfeiture of the relator's membership was made, but we assume for the purposes of this case, that if the rule in question was not applicable to the relator when that alleged forfeiture occurred, in other words, if there was no default on his part under any rule of the Board, his amotion was illegal, and the court has the power and duty, by virtue of a visitatorial power to rectify it. As the language of section 3 of rule X is very plain and evidently self-executing, this contention depends entirely on the proposition that members of the Board when suspended for a definite period from the "privileges" of membership are relieved for the like time from all its obligations and

liabilities, or at all events, from any obligation to pay "annual assessments."

With this proposition of the relator we cannot agree. To discuss it in connection with the various rules of the Board of Trade appearing as exhibits to the return, would be unconvincing for one party to this appeal and unnecessary for the other. We will therefore content ourselves with the statement that to us it seems evident that the "Rules, Regulations and By-laws," by which the relator agreed on becoming a member of the Board he would be governed, contemplate and provide for payment of annual assessments even by members under suspension, definite or indefinite. Consequently we do not think the court below erred in overruling the demurrer to the answer or refusing the peremptory writ asked for. In what we have said we do not wish to be understood as indicating that the rule of the Board involved, or its effect under the circumstances shown by the pleadings in this case, on the rights and interests of the relator, was in our opinion unreasonable or unjust. For the reasons hereinbefore given, we have not felt ourselves at liberty to consider the question, and therefore express no opinion thereon.

The judgment of the Circuit Court is affirmed.

Affirmed.

Christian Peterson v. Matilda Guttormsen.

Gen. No. 12,739.

1. **APPEAL**—*from what does not lie.* An appeal does not lie from a decree in a proceeding to set aside a will if such decree is not final.

Bill to set aside will. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1905. Appeal dismissed. Opinion filed March 6, 1906.

JAMES N. TILTON and HENRY J. GIBBS, for appellant.

No appearance for appellee.

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PER CURIAM. The record in this case shows that appellant filed his bill of complaint by which he seeks to set aside and have declared null and void an instrument purporting to be the last will and testament of Christian Peterson, deceased, the father of complainant. The will was admitted to probate. It devises real estate. The record further shows that after answer and replication thereto were filed a jury was impaneled to try the issues and after hearing the evidence adduced returned a verdict as follows: "We the jury find the issues for the defendant." The record then proceeds: "And thereupon the complainant submits to the court his motion for a new trial of this cause, which motion is overruled by the court, whereupon the complainant prays an appeal from the order of this court," etc.

We have examined the record for a final decree in the cause in vain. It does not show a final decree. This appeal must therefore be dismissed.

If, however, the record showed a final decree, the appeal would have to be dismissed for the reason that a freehold is involved, and this court has no jurisdiction. *Bice v. Hall*, 21 Ill. App., 298; *Andrews v. Andrews*, 9 Ill. App., 408; *Andrews v. Andrews*, 110 Ill., 223; *Moyer v. Swygart*, 21 Ill. App., 498, and same case 125 Ill., 262; *Craig v. Southard*, 45 Ill. App., 529; *Newberry v. Blatchford*, 106 Ill., 584.

Appellant may have leave to withdraw the record if he so desires.

Appeal dismissed.

**The People of the State of Illinois, ex rel. Julius U.
Pritchard v. Thomas Brennan, et al.**

Gen. No. 11,877.

1. BOARD OF EDUCATION—*power of. to try employes.* The trial of charges against the employes of the Board of Education is with such board and not with the Civil Service Commission, and this notwithstanding such employes may not have been contributors to the school employes' pension fund.

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Mandamus proceeding. Error to the Circuit Court of Cook County; the Hon. EDWARD O. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 6, 1906.

Statement by the Court. This writ of error brings before the court a judgment entered in the Circuit Court sustaining a demurrer to a petition for *mandamus* against the Board of Education of the city of Chicago, and dismissing the petition.

The relator, Julius U. Pritchard, sets up in his petition that in October, 1903, he was a civil service employe of the Board of Education, having taken the civil service examination as mechanical engineer; that he performed his duties as engineer of the Graham School until October 16, 1903, at which time he received a notice from the Board of Education suspending him as such engineer. On October 21, 1903, the petitioner received a further notice from the Board of Education to appear for trial before the Committee on Buildings and Grounds, one of the committees of the Board of Education, and he then and there appeared before the committee and was tried, although he protested. The petition asserts that the civil service commission had not authorized the Board of Education to try civil service employes. On October 30, 1903, the petitioner received another communication from the Board of Education notifying him that he was laid off for sixty days from October 15, 1903, without pay, on account of insubordination, at the expiration of which time he would be transferred from the Graham School. The petitioner avers that he was not guilty of insubordination; that he repeatedly tendered his services to the Board of Education; that the position of engineer at the Graham School has not been abolished; that there are sufficient funds to pay for such service, and the Board of Education has prevented the petitioner from performing his duties as such engineer.

By an amendment to the petition it is averred that petitioner has not contributed to the school employes' pension fund created by the legislature in 1903.

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WALTER F. HEINEMANN and EDWIN BEBB, for plaintiff in error; WESTERN STARR, of counsel.

JAMES MAHER and ANGUS ROY SHANNON, for defendants in error.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The question presented by the record is whether a civil service employe, in the service of the Board of Education, and who has not contributed to the school employes' pension fund created under the act of the General Assembly of the State of Illinois passed in 1903, can be tried by the Board of Education for dereliction of duty and punishment imposed therefor; or whether the Civil Service Commission alone has the right and power to try such employe, as contended by plaintiff in error.

The contention of plaintiff in error is based on section 12 of an Act to regulate the Civil Service of Cities approved March 20, 1895. Laws of Illinois 1895, p. 88. (Hurd's R. S. 1903, p. 381.) This section provides:

"No officer or employe in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before some officer or board appointed by said commission to conduct such investigation. * * *"

Under this section it is claimed that the Board of Education had no right or power to try the petitioner for the offense and to adjudge the punishment set forth in the petition.

It is further contended on behalf of plaintiff in error that under the powers given by the School Employes' Pension Act of 1903, only contributors to that pension fund can be tried by the Board of Education; and inasmuch as the relator was not a contributor to the fund he could not be tried or removed or disciplined by the Board of Education.

In support of these contentions it is urged that section

16 of the Pension Law of 1903 cannot in any way be construed to mean more than its express words provide; that it comprehends within its provision only those who contribute to the pension fund, and does not affect such employes as do not contribute to the fund, and that the latter employes, therefore, are subject to the provisions of section 12 of the Civil Service Act.

These contentions bring before the court for construction section 12 of the Civil Service Act above mentioned, section 8 of the Teachers & Employes' Pension Act of 1895, and section 16 of the Act of 1903.

In *Brenan v. The People*, 176 Ill., 620, the court was called upon to decide to what extent employes of the Board of Education came under the provisions of the Civil Service Act in view of the Teachers and Employes' Pension Act passed at the same session of the legislature. While the court held that the two acts are inconsistent so far as the power of removal of employes of the Board of Education is concerned, it was also held that there was no other repugnancy between them, and that effect should be given to the provision of the Pension Act, as the latest expression of the legislative will, and, consequently, that the "Board of Education has the power to investigate and determine charges against its employes and to remove and discharge them, but that in all other respects the Civil Service Act applies to such employes according to its terms."

It remains for us then to determine what effect, if any, section 16 of the Act of 1903 has or was intended to have upon the provisions of the Acts of 1895, so far as it bears upon the question before us.

It is urged in behalf of plaintiff in error that section 8 of the Law of 1895 is inconsistent with section 16 of the Act of 1903, and that, therefore, the latter act repeals the former by implication. With this contention we cannot agree. Nor do we think it can be held that section 8, or that portion of it relating to the investigation and determination of charges by the Board of Education, is repealed by the Act of 1903. So far as the point here involved is concerned, section 16 of the

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Act of 1903 is substantially a re-enactment of section 8 of the Act of 1895. Clearly it leaves the trial of charges against employes of the Board of Education with the board where it rested under the Act of 1895.

Finding no error in the decision of the Circuit Court in sustaining the demurrer to the petition, the judgment is affirmed.

Affirmed.

**The American Bonding & Trust Company, et al., v.
New Amsterdam Casualty Company.**

Gen. No. 11,989.

1. **BOND**—*when non-execution of, does not affect validity.* A bond containing a provision as follows: "That it is essential to the condition of this bond that the employee's signature be hereto subscribed and witnessed, and that the acceptance of the employer be also executed in like manner," is not invalid for the failure of the employer to sign the same until after it had expired by limitation.

2. **BOND**—*what does not discharge employer's indemnity.* Held, that the failure of the employer to report a specific delinquency to the bonding company was not such an act as released such company under the bond.

3. **BOND**—*employer's indemnity, construed.* An employer's indemnity bond which provides for reimbursement for pecuniary loss sustained "by any act of fraud or dishonesty amounting to larceny or embezzlement," is an indemnification only as against any loss that may have been sustained (1) by acts of fraud or (2) by dishonesty amounting to larceny or embezzlement.

4. **NIL DEBET**—*what not raised by plea of.* A plea of *nil debet* does not raise the question of the validity of an employer's indemnity bond because of its non-written acceptance by the employer, as provided in the bond, where such bond was set up in the declaration in *haec verba*.

5. **BOOKS OF ACCOUNT**—*when admission of, not erroneous.* Notwithstanding no such foundation as is provided by statute was laid, yet it is held upon the entire record in this case that the admission of books of account was not reversible error.

6. **AGENT**—*when acts of, not competent against principal.* The acts of an agent which do not appear to have been authorized by his principal, cannot be shown.

7. INSTRUCTIONS—*must not submit questions of law.* Instructions must not leave questions of law for the determination of the jury.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1904. Reversed and remanded. Opinion filed March 6, 1906.

Statement by the Court. This suit is based upon two fidelity bonds executed by the appellant Knapp as principal and the appellant The American Bonding & Trust Company as surety. The first of the bonds runs to the appellee reciting that the appellant Knapp has been appointed general agent of appellee and relates to the business of the accident department of the appellee. The second bond is in all respects the same, except that it recites that appellant Knapp has been appointed manager of the northwestern department of appellee and relates to employers' liability and general liability insurance.

By the terms of the bonds the bonding company agrees upon certain conditions to "reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained, of money, securities or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty amounting to larceny or embezzlement committed by the employe during the continuance of this bond, in the performance of the duties of said office or position, or such other position as he may subsequently be appointed to, or called upon to fill by the employer in said service."

The first bond covered the period from December 8, 1899, to December 8, 1900; the other from November 7, 1899, to November 7, 1900.

The action was debt and but one plea was filed by the defendants to the declaration, namely, *nil debet*.

The evidence tended to show that Knapp had two contracts with appellee, one covering the personal accident department of appellee's business and the other the liability department; that during the time covered by the bonds Knapp was

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employed by it, and collected certain premiums belonging to appellee for which he failed to account, or even to notify appellee that the premiums had been collected by him. The amounts collected were shown by a statement of account, under date of April 30, 1901, submitted by Knapp to appellee, and by appellee's books of account showing the transaction had between appellee and Knapp. By the terms of the contracts between appellee and Knapp, the latter was entitled to deduct his commissions from the collections made by him, and was obliged to remit the balance only to appellee.

By the statement submitted by appellant Knapp to the New Amsterdam Casualty Company, appellee, it appears that Knapp had collected premiums belonging to appellee amounting to \$2,130.77 on what was styled by Knapp in his statement as "accounts current" numbered respectively 15 to 20, inclusive. In the statement Knapp charges himself with other moneys, making the total credits to appellee as shown by the statement \$4,678.23, and attempts to charge appellee with \$3,133.22, moneys advanced by him "to agents for company," and showing a balance due to appellee of \$532.30, which amount he tendered to appellee at the trial on condition that it be accepted in full of all claims under the bonds, but the tender was refused.

When appellee first offered the bonds in evidence, it appeared that appellee, the employer, had not signed the bonds in the place indicated thereon for the employer's signature. The admission of the bonds in evidence was objected to upon the ground that the signature of the employer was essential to the validity of the bonds, and over the objection of appellants the court permitted appellee to withdraw the bonds and have the treasurer of appellee sign them, and amend the declaration on its face so as to show the bonds were thus signed.

The jury returned a verdict of \$1,957.14 in favor of appellee, and special findings of the amounts found due on each of the bonds. After overruling a motion for a new trial the court entered judgment upon the verdict.

PAM & HURD and CHARLES B. STAFFORD, for appellants.

D'ANCONA & PFLAUM, for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The first question presented in argument on this appeal is the invalidity of the bonds sued on because of the failure of appellee to sign them until after they had expired by limitation.

The fifteenth condition of the bonds is as follows: "That it is essential to the validity of this bond that the employe's signature be hereto subscribed and witnessed, and that the acceptance of the employer be also executed in like manner." The argument in support of the contention that the bonds were not valid or in force is based upon this provision in the bond and the fact that they had not been signed when they were first offered in evidence. In support of this proposition cases are cited where the principal or co-surety failed to sign bonds. In such cases a different principle or rule would apply. The only purpose of the signature of appellee to these bonds would be to evidence the acceptance of the bonds by appellee. Instruments such as these in question are held to be insurance policies, and the principles applicable to insurance policies, not those of suretyship, are applied to them. *The People ex rel. v. Rose*, 174 Ill., 310; *Provident Savings Life Assurance Society v. Cannon*, 103 Ill. App., 534; *American Surety Company v. Pauly*, 170 U. S., 136. We think the receipt of the bonds when they were delivered by appellants and the payment of the premiums as shown by the bonds themselves sufficiently evidenced the acceptance of the bonds by appellee. Furthermore, this question is not properly raised by the plea of *nil debet*. Such a defense must be raised by demurrer or a special plea. The instruments were set out in *haec verba* in the declaration and the absence of the signature of the New Amsterdam Casualty Company appeared on the face of the declaration as well as the provision of the bonds above set forth. No reason is perceived therefore why the point could not have been raised on demurrer. It cannot be raised under the plea filed. 1 Chitty on Pleading (9th Am. Ed.) 483.

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The admission of the books of account of appellee in evidence is assigned for error. It is urged that the proper foundation for the admission of the books was not laid by proof that the person making the entries in the books was deceased or a non-resident of the state at the time of the trial, nor was it shown that the entries were made in the usual course of trade and of the duty or employment of the party so testifying. The objection to this evidence as shown by the abstract did not go to the point raised and argued here. For convenience a statement was drawn off the books and offered in evidence and counsel for appellants admitted "that the statement as prepared, in so far as it goes, is a correct transcript made up from the different books of account kept by the New Amsterdam Casualty Company, without waiving or admitting in any way that it is correct as against either of the defendants or any of the defendants' rights to object to the correctness or accuracy of any of the figures thereon, but only to the extent that in so far as the books of account of the New Amsterdam Casualty Company, whether books of original entry or otherwise, show this account, these figures are correctly taken from those books; and this statement may be introduced in so far as it goes, in lieu of those books without binding the defendants in any way as to its correctness, and without in any way admitting its correctness in so far as the defendants are concerned." Upon this stipulation the statement was admitted, and the books being present in court were then offered in evidence over the objection to their competency and that it had not been shown that they are accurate, and further that Knapp had never had an opportunity of examining them as to their accuracy, and that neither of the defendants are bound by them, and that the books were not kept with their knowledge, consent or approval, and that they are not competent, material or relevant. The books offered in evidence simply showed the dates of the policies, their numbers and the parties to whom issued, and the amounts of the premiums thereon chargeable to Knapp. But these books did not purport to show the premiums collected or the defalcations of appellant Knapp. The state-

ment made by Knapp himself under date of April 30, 1901, showed the collections made by Knapp of premiums amounting to \$2,130.77. This statement showed the collection of moneys belonging to appellee and the manner in which he attempted to account for them. This with the testimony of Pratt as to his conversations with Knapp furnished a basis for the jury to find the amounts collected by Knapp during the period covered by the bonds without referring to the books of account. We do not perceive, therefore, any prejudicial error in admitting the books of account in view of the record in the case. We do not think, however, that the proper foundation was laid for the introduction of the books.

It is claimed that the trial court erred in rejecting evidence regarding advances made by appellant Knapp to his sub-agents. Appellants attempted to show that Knapp had entered into contracts with certain sub-agents and that out of the moneys collected by him, on account of appellee, he had made advancements to his sub-agents.

We think the trial court ruled correctly in excluding the evidence. The contract between Knapp and appellee contemplated that Knapp would employ sub-agents in the transaction of the business committed to him, and it doubtless knew he had sub-agents in his employ, but the employment of such sub-agents could not in any manner affect his contract with appellee or his obligations to appellee. The evidence offered by appellants consisted of the contracts between Knapp and his sub-agents and conversations between Knapp and Hopper, the secretary of appellee, and correspondence between Knapp and Hopper as secretary, and of conversations between Hopper and Fatch, one of the sub-agents of Knapp. No authority to Hopper as secretary was shown to vary the terms of the contract between Knapp and appellee which was under seal. It seems clear from the contract between Knapp and appellee that the former had no authority to bind the latter by any arrangement he may have made with his sub-agents, and therefore that whole matter was irrelevant to the issues, and was properly excluded.

The point is made on behalf of the Bonding & Trust Com-

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pany that Knapp failed to make monthly remittances in accordance with his contract with appellee as early as May, 1900, and that appellee retained him in its service without notifying the Bonding Company. It is urged that under all the circumstances this operated to relieve the Bonding Company from any subsequent defaults of Knapp, under the fifth condition of the bond. This condition provides that if the employer condones any default on the part of the employe which would give the employer the right to make a claim under the bond, and continues the employe in its service without written notification to the Bonding Company, the latter shall not be responsible for any subsequent default.

Without going into a discussion of the evidence in detail upon this point, but upon a careful examination of it, we think the evidence is entirely insufficient to sustain this claim. The reasoning of the courts in *American Surety Co. v. Pauly*, 170 U. S., 160, and in *Perpetual Building & Loan Association v. U. S. Fidelity & Guarantee Co.*, 92 N. W. Rep., 686, seems to us to be applicable to the case at bar and to state the reasonable rule of conduct under provisions of this nature in guarantee bonds.

Error is assigned upon the construction which the court gave to the clause in the bond requiring the Bonding Company to reimburse the employer for such pecuniary loss sustained "by any act of fraud or dishonesty amounting to larceny or embezzlement" committed, etc. It is claimed that the learned trial judge held that the word "fraud" was not qualified by the terms "amounting to larceny or embezzlement," and that hence the bond covered any act of fraud of the employe, and also any act of dishonesty of the employe amounting to larceny or embezzlement.

Aside from the instructions given, no specific ruling of the court upon this language of the bond is pointed out to us by counsel. We will therefore pass to the instructions and consider them with reference to this and other provisions of the bond.

After a statement of what the case is about and the issues the first instruction given by the court proceeds as follows:

"It is for you, gentlemen of the jury, to determine from a preponderance of the evidence in this case if the plaintiff herein has sustained any pecuniary loss by reason of any act or acts of fraud, or dishonesty amounting to larceny or embezzlement on the part of said Clyde D. Knapp, Jr., which were committed during the continuance of the bonds set out in the declaration filed in this case, if you believe from a preponderance of the evidence that any act or acts of fraud or dishonesty amounting to larceny or embezzlement were committed by him during the continuance of said bonds," etc.

The second instruction given is as follows:

"You are instructed as a matter of law that by the phrase in said bond entitling the plaintiff to be reimbursed for such pecuniary loss as the employer shall have sustained by any act of fraud, or dishonesty amounting to larceny or embezzlement committed by the employe during the continuance of said bonds is meant any loss that it may have sustained (1) by any acts of fraud on his part, or (2) any loss it may have sustained by reason of any dishonesty on his part amounting to larceny or embezzlement committed during said time, and that in order to find for the plaintiff it is not necessary that you should find both of said conditions to have existed at the time or times when said pecuniary loss, if any, was sustained."

It is plain that the learned judge in these instructions did not consider the words "amounting to larceny and embezzlement" as qualifying the words "any act of fraud." Doubtless he considered the case of City Trust Company v. Lee, 204 Ill., 69, as controlling this case. The phrase under consideration in that case was somewhat different from the terms of the bonds in this case. The guaranty in the Lee case was against loss "sustained by the employer by or through the dishonesty or any act of fraud of the employe amounting to larceny or embezzlement;" and it was held that the phrase amounting to larceny, etc., did not qualify the word dishonesty. It seems clear that in the bonds in this case the words "fraud or dishonesty" and the words "amounting to

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larceny or embezzlement" are both phrases qualifying the word "act." But as applied to the facts of this case it is more a matter of phraseology than of meaning or substance. In *Guaranty Company v. Mechanics Savings & Trust Co.*, 80 Fed. Rep., at page 772, it was said: "Defenses to this action involve a construction of the bonds rather than a conflict about the facts. While in contracts like this the more natural attitude of a surety is assumed by the form, it is in effect one of insurance and whatever indefiniteness of language or ambiguity of expression there may be should be resolved most favorably to the assured, not only because it is the language of the insurer, but also because the general purpose of the contract is full indemnity, and this should not be defeated except by clear and unambiguous limitations assented to by the parties." And further on in the same opinion the court continues: "It is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls fairly within the employment of the person whose honesty is guaranteed."

Keeping in mind then the general purpose of these bonds, and that the words "fraud" and "larceny" and "embezzlement" in the bonds or policies sued on are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employe to pay over to his employer, or account to him for any money, securities or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employe, we are not justified in resorting to narrow constructions of the provisions of the contract or in refinements as to the meanings of particular phrases to relieve the insurers from liability on these bonds unless required to do so by the law, or the clearly expressed purpose of the contract. The phrase of these bonds quoted above read in connection with the next paragraph of the bonds relating to their continuance in force from year to year, which provides "in which case the company shall remain liable for any dishonest act of the employe, amounting to larceny or embezzle-

ment," and other provisions of the bonds, develops very clearly the purpose and scope of the undertaking as above indicated; and further that it can make no perceptible difference whether the phrase under consideration relates to the words "fraud" or "dishonesty" or "act." We think, therefore, that these instructions are open to the criticism made. There was, however, no substantial controversy in the evidence which would be affected in any wise by the error in grammatical construction of the phrase in question. These bonds were intended to protect the New Amsterdam Casualty Company from financial loss from just such dishonest acts of Knapp as the evidence in the case shows. *City Trust, etc., Co. v. Lee*, 204 Ill., 69; *Champion Ice M. & C. Co. v. American Bonding & T. Co.*, 75 S. W. Rep., 197.

We agree with the contention of appellants that the third and fifth instructions given at the instance of appellee are erroneous in that they submit to the jury the legal effect of the contracts.

Appellants assign for error the refusal to give the tenth, eleventh, twelfth, seventeenth, eighteenth, nineteenth and twenty-first instructions requested by them. We find no error in the refusal of the court to give these instructions. Some of them had been sufficiently covered by instructions given and the others did not correctly state the law of the case.

The verdict rendered in this case was for \$966.22 under the personal accident bond, and \$990.92 under the liability bond. This includes collections in January, February and March, 1901, on the personal accident bond which expired December 8, 1900. The verdict on this bond was therefore too large. According to the statement of Knapp the collections for personal accident premiums during the months of October, November and December, 1900, amounted to only \$337.86, and the proofs of loss presented to appellant claimed on this account only \$271.36. We do not think appellant is liable for collections made after the bonds expired.

In our opinion the evidence of Pratt is not sufficient to show any liability for premiums collected from the Spruce

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Mining Company and from R. & S. Sollitt, for the reason that it does not appear from his testimony when these premiums were collected. The jury would hardly be justified in drawing the inference from his testimony that these premiums were collected during the life of the bond.

For the reasons indicated the judgment is reversed and the cause is remanded.

Reversed and remanded.

Ira M. Cobe v. John W. Airey, et al.

John W. Airey, et al., v. Ira M. Cobe.

Gen. Nos. 12,272, 12,277.

CONSOLIDATED FOR HEARING.

1. **HOMESTEAD LOAN ASSOCIATION—*what not.*** A company organized under the laws of a sister State will not be permitted to avail of the benefits of the homestead loan association act in this State if from its powers and methods of doing business it is not such an organization, within the meaning of the laws of this State.

2. **USURY—*when defense of, established.*** A homestead loan association is guilty of usury which makes a loan fixing the interest and premium to be paid thereon arbitrarily and without reference, and without attempt to conform, to the statutes regulating the making of such loans by such associations, if the interest and premium charged exceed the statutory contract rate.

Foreclosure proceeding. Appeals from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed and remanded with directions. Opinion filed March 6, 1906.

Statement by the Court. Ira M. Cobe filed his bill of complaint in the Superior Court against John W. and Lucinda Airey to foreclose a mortgage given by them to the North American Savings, Loan & Building Company, a Minnesota corporation, on real estate in Cook county, Illi-

nois, which had been sold and assigned by the receiver of the company to Cobe.

The bill represents that on January 11, 1898, Edward B. Graves was duly appointed receiver of the North American Savings, Loan & Building Company, a corporation organized under the laws of the State of Minnesota, relating to homestead and loan associations, by an order of the District Court of the Second Judicial District of Minnesota, and that he qualified as such receiver; that on January 11, 1898, said company on the relation of the Attorney General of said State of Minnesota, was duly and legally declared insolvent and was unable to carry out the purposes for which it was organized; that under the laws of Minnesota and the by-laws of the company all borrowers of its funds were required to be shareholders in an amount equal to the sum loaned, and payments for the shares were to be made in installments of sixty cents per month on each share held by the borrower, and by the maturity of additional shares equal at par value to the premium bid by the borrowing member for the privilege of loan, etc., and by the payment of monthly installments of interest on the principal sum at the rate of seven per cent. per annum.

That on February 4, 1891, John W. Airey being the owner of 24 shares in said company, and being then indebted to it in the sum of \$1,200 for money then advanced to him, made and delivered to it his note of that date, whereby he promised to pay to the company at its office in St Paul, Minnesota, \$1,200 after three years and before nine years from date or at the time when 24 shares of stock should become of the par value of \$100 with interest at six per cent. per annum in equal monthly installments, and also agreed to pay the sum of \$20.40 each month, of which amount \$7.20 was to be applied on 12 additional shares as premium stock and the sum of \$6 as interest on said \$1,200, said payments of dues and interest to be continued until the series to which said shares of stock belonged should become of the par value of \$100; that to secure said loan, etc., he assigned to said company said shares of stock; that under the plan of business of

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said company Airey bid for the purpose of obtaining priority a premium equal to 50 per cent. of the value of said 24 shares, and to further secure the payment of said principal sum, interest, premium and dues he mortgaged to said company the premises described therein.

On December 22, 1903, by order of said District Court said receiver was directed to sell the assets of said company, and on January 17, 1904, said receiver assigned said securities to complainant.

There was due at the time of the appointment of said receiver, from Airey to the company, \$849.56, and that there was due at the filing of the bill said sum with interest thereon at 7 per cent. per annum and \$100 attorneys' fees, making a total of \$1,306.69; that default existed and foreclosure was prayed.

The company's articles of incorporation, the note and mortgage, were attached to the bill as exhibits and were afterwards offered in evidence.

Airey and his wife filed their joint and several answer in which they set up the defense of usury and set up sections of the statutes of Minnesota under which the company was organized, as follows:

"Sec. 1. Whenever any number of persons not less than ten desiring to be incorporated as a building and loan association for the purpose of accumulating the savings and funds of its members and loaning them only the funds so accumulated, they shall make and execute a written declaration to that effect, etc.

"Sec. 3. Each association shall adopt by-laws for its government and therein prescribe the manner in which its business shall be transacted, which by-laws shall be in conformity with the provisions of this act * * *.

"Sec. 4. For every loan made a non-negotiable bond or note on real estate shall be given, which security shall be in double the value of the loan and satisfactory to the directors and shall be accompanied by transfer and pledge of the shares of the borrower to the association. The shares so pledged shall be held by the corporation as collateral security * * *.

"Sec. 15. All building and loan associations hereafter in-

incorporated in this State shall have an authorized capital of two million dollars * * *.

"Sec. 18. On or before the first day of September in each year every building and loan association * * * shall deposit with the Public Examiner a report of its affairs and operations for the year ending on the 30th day of June, immediately preceding: Such reports to be verified * * * and containing the following * * *:

"A detailed statement of assets and liabilities * * *.

"Sec. 22. The name 'Building and Loan' association * * * shall include corporations * * * doing a savings and loan or investment business, on the building society plan, whether mutual or otherwise, and whether issuing certificates of stock, which mature at a time fixed in advance or not.

"Sec. 25. Any premiums taken for loans * * * shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury.

"Sec. 26. Every such association * * * are hereby prohibited from hereafter creating or issuing preferred or non-contributing stock * * *.

"Sec. 30. Every such association shall provide in its by-laws in what manner applications and bids shall be received and who shall be entitled to loans thereunder; such bids shall be open at said times, and all the money in the loan fund shall be loaned upon such bids provided that the securities shall be in the amount and of the character stated in this act, and the amount bid shall not be less than the rate for any legal indebtedness under the laws of this State; the object of this section being to prevent such association from retaining in its loan fund any moneys actually bid for, for the purpose of securing better bids, or inducing bidders to raise their bids and to compel said associations to loan their funds to the highest and best bidders therefor.

"Sec. 31. That no association * * * shall set apart as an expense fund, exclusive of admission fees, to exceed \$1.00 per year upon each share of its stock or assess any fines * * * in excess of 10c per share for the first month that the same shall be in arrears, and 15c per share per month for every month thereafter."

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The answer also set out the by-laws of the company which were in force at the time of the transaction in question, which were as follows:

"Section 1. Any person may become a member * * * by signing an application * * * and paying the admission fee. Such application, however, must be approved by the president or managing director before the certificate shall be issued thereon.

"Sec. 2. Every person becoming a member * * * shall pay an admission fee as follows: * * * On one share of stock \$3, on 2 shares \$5, on 3 shares \$6, etc., on 10 shares \$10; each additional share \$1.00.

"Article 2, Section 1. Shares * * * shall be payable in monthly installments of 60c per share * * *.

"Sec. 3. When any share has matured by payments and profits credited to the full amount of \$100 the same may be withdrawn * * *.

"Sec. 2. On all advance payments for not less than six months the members shall be entitled to receive interest at the rate of 7 per cent. per annum.

"Sec. 8. This company may issue special certificates for stock fully paid up. Paid up stock shall be sold at \$50 per share in advance * * *. To members investing in this way a dividend of 6 per cent. per annum, payable semi-annually, shall be paid on the price of stock. The dividend will therefore be \$15 every six months on 10 shares costing \$500.

"The amount of the dividend shall be deducted from the profits earned, the balance being credited to the stock. When the amount standing to the credit of the stock equals \$100 the stock shall be deemed to have matured and the holder may * * * receive \$100 per share therefor. Members withdrawing this stock may receive the full amount paid therefor at any time after two years, together with $\frac{3}{4}$ of the accrued earnings of said stock, less the 6 per cent. interest paid on such shares.

"Article 3, Section 1. The funds of this company can be loaned only to members on real estate security or on shares * * *.

"Sec. 5. Members applying for loans, who have not paid

installments to the amount of \$10, must advance that amount to secure the expenses of appraisal and examination of title
* * *

"No loan shall be made until the abstract of title * * * has been examined and favorably reported upon by the attorney.

"Sec. 10. All applications * * * shall be made in writing on blanks to be furnished by the company * * *.

"Sec. 11. All members filing applications shall have the privilege of bidding for loans. Bids shall be opened on the second Tuesday of each month and on such other days as the directors may appoint.

"Whenever the board is prepared to make a loan a notice stating the time when bids shall be open shall be sent by mail to every applicant at least 15 days before the day for opening the bids.

"Sec. 12. No loan shall be granted to any members unless three months' installments on stock shall have been paid unless the directors shall decide to the contrary.

"Sec. 16. No application for loan will be entertained in which the bonus bid is less than the amount fixed by resolution by the board of directors for the year in which the loan is made.

"Article 5, Section 1. If any monthly installment is not paid when due. * * * such shares shall be forfeited but they will be reinstated at any time within 12 months by the payment of all arrears and by the payment of a fine of 10c per share for the first month and a fine each subsequent month of 15c per month upon each share.

LOCAL BOARDS.

"Article 7, Section 1. In localities where not less than 100 shares have been subscribed and first payment made, a local board, consisting of not less than five members, each holding not less than 10 shares, may be nominated by the agent of the company and appointed by the board of directors. The duties of members of local boards shall be to promote the increase of membership, the prompt payment of installments and advising the board of directors in relation to loans in their localities."

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It is denied that there is due to complainant the sum of \$1,306.39 or any sum of money whatever. It is also denied that Airey bid and promised to pay the company in consideration of obtaining said loan a premium equal to 50 per cent. of the par value of said stock.

The answer avers that the note and mortgage were executed in Illinois, and that at the time defendants were residents and citizens of Illinois; that notwithstanding the provisions of the note and mortgage that the same are to be governed by the laws of Minnesota, they are as to their execution, construction and enforcement governed by the laws of Illinois; that at the time of making the loan the company had a general agency in Illinois, was doing business in this State and that its agents in control of said agency had authority to and did pass upon the application for the loan and that all transactions in relation thereto were conducted with such agency in Illinois and the securities were delivered to and the money was paid through said agency in Illinois and was received by defendants in this State to be used here and that it was further agreed that the loan would be repaid here by monthly installments at the Illinois agency and was so paid for a long period of time after the consummation of the transaction; that the said provisions were not inserted in the securities in good faith, but as a fraudulent device to enable the company to evade the usury laws of Illinois.

By an amendment to the answer it is claimed that said company was not a building and loan association within the meaning of the laws of Illinois, and that the statute of Minnesota is not sufficiently similar to the statute of Illinois governing building and loan associations to entitle the company to invoke the rule of comity or justify the courts of this State in applying to it the same rules and according it the same privileges as are applicable to Illinois associations.

It is further asserted that said company was in its character by virtue of its charter and by-laws a fraudulent device to enable it to secure extortionate and usurious compensation for the use of its money; that said company issued and sold, in accordance with its by-laws, upon the payment of \$50 per

share, certificates of stock fully paid up, and agreed to and did pay thereon semi-annual dividends of seven per cent. per annum which were deducted from the profits earned on such paid up stock, the balance being credited to the stock which was matured when the amount standing to its credit should equal \$100, and was subject to withdrawal at any time after two years, the member holding such stock in case of withdrawal to receive the full amount paid therefor, together with three-fourths of the accrued earnings of said stock less said dividends; that the company prior to and at the time of the transaction in question had established agencies in various States other than Minnesota, and loaned its money on real estate situated in other States beyond the inspection and control of its officers and it transacted the business through the medium of local boards of non-residents of Minnesota; that its money was not offered for loan in open meeting of its board of directors to the stockholder who might bid the highest premium for the priority of loan as contemplated by the statute of Illinois, and that the company was in other particulars essentially different in character from an Illinois building and loan association; that in making the loan in question it did not offer its money at a regular stated open meeting of its board of directors to the stockholders who bid the highest premium for the preference, but that the whole transaction was a matter of private negotiations between defendants and the agents of said company in this State contrary to the provisions of the Illinois statute.

Complainant's replication to the original answer was ordered to stand to the answer as amended.

The cause was referred to a master in chancery to take proofs and report the evidence with his conclusions on the law and the evidence.

The master's report finds that the company was dissolved and the complainant purchased the assets of the company at the receiver's sale and among them the note and the mortgage in question; that on January 15, 1891, the defendant Airey made and delivered to one of the local agents of the company at Morgan Park, Cook county, Illinois, his bid for

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a loan of \$1,200, in which he agreed to hold 24 shares of stock in the company and to continue payments of installments on the stock until it matured or until the loan was paid otherwise, and he agreed to pay the company 50 per cent. of the stock as a bonus for the loan; that the stock was assigned to the company and the note and mortgage given as security for the loan; that in his opinion the question presented was not one of usury but one of power on the part of the company to exact from Airey the stipulation contained in the bid for the loan, and that the company had exceeded its power, and that the complainant was only entitled to recover the amount actually loaned with interest at six per cent. per annum, less the amounts paid to the company by Airey, and states the account as follows:

"Amount of loan.....	\$ 1,200.00
Deduct membership fee.....	24.00
	<hr/>
Balance	1,176.00
Interest on \$1,176 from Feb. 4, 1891, to June 14, A. D. 1896, at 6 per cent., computed on the basis of monthly rests and application of payments	210.23
	<hr/>
Total	1,386.23

PAYMENTS.

64 1-3, \$14.40, stock.....	\$926.40	
64, \$6.00	384.00	1,310.40
	<hr/>	<hr/>
Balance due June 4, 1896.....	75.83	
Interest at 6 per cent. from June 4, 1896, to Dec. 14, 1904.....	39.05	
	<hr/>	<hr/>
	114.88	
Solicitor's fees	100.00	
	<hr/>	<hr/>
Due complainant Dec. 14, 1904.....	214.88"	

Objections and exceptions to the master's report were filed by complainant and defendants.

The court by its decree sustained the master's report except in certain particulars not necessary to state here, and entered a decree of foreclosure for the amount found by the master.

Both the complainant and the defendants prosecute separate appeals which are here consolidated for hearing.

S. W. SWABEY, for Ira M. Cobe, appellant and appellee.

FREDERICK MAINS, for John W. Airey, et al., appellants and appellees.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

The defense of usury interposed by the defendants to the bill rests upon the question whether or not the North American Savings, Loan & Building Company was a building and loan association within the intent and purpose of the laws of Illinois governing homestead loan associations under the evidence in the record; and if it was a building and loan association within the meaning and intent of the laws of Illinois at the time of the transaction in question, did it conform to the requirements of such laws in making the loan to defendant Airey?

On the hearing before the master in chancery the copies of the Minnesota statute under which the company was organized, and the by-laws of the company as set out in the answer of the defendants, were stipulated to be correct copies respectively of the statute and the by-laws, and were introduced in evidence.

The copy of the articles of incorporation of the company attached to the bill of complaint was also put in evidence. By article third of the articles of incorporation it is provided among other things: "This corporation may also borrow money upon the sale of debentures issued by said corporation." Article fourth fixes the limit of indebtedness which

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the corporation may incur at \$1,000,000, and provides that the amount of its indebtedness, exclusive of debentures issued by it, shall not exceed \$10,000.

Section 8 of the by-laws of the company provided for the issue of fully paid up stock for \$50 per share, and for dividends upon such stock at six per cent. per annum, payable semi-annually, on the price of the stock; and that the amount of the dividend should be deducted from the profits earned, the balance to be credited to the stock. When the amount standing to the credit of the stock equaled \$100 the stock should be deemed to have matured, and the holder might withdraw the same, receiving the amount paid therefor at any time after two years, together with three-fourths of the accrued earnings of said stock, less six per cent. interest paid on such shares.

The evidence shows that under this section the company was engaged in selling fully paid up stock before and at the time of the loan to defendant Airey, and that on March 31, 1891, it had sold of this stock \$33,866, and that of this amount \$410 had been withdrawn.

It further appears from the evidence that the company did not offer its money for loan in open meetings of its board of directors, but at closed meetings at which written applications, such as Airey made for this loan, were received from borrowers who were ignorant of the amount in the treasury and of the number or terms of applications made by others. The terms of the loans were fixed arbitrarily as to the premiums, which were made at one hundred per cent. of the amount loaned, payable in fifty per cent. of the borrower's stock, which in each instance was double the amount of the loan. The company had local boards organized in localities in this and other states which were to pass upon the loans, but in the Airey loan this formality was not observed. There were other characteristic peculiarities of the business conducted by the company bearing upon the question before us, which might be mentioned, but we do not deem it necessary, in the view we take of the case, to call attention to them.

In our opinion the features of the organization above mentioned and its methods of business as shown by the evidence place the company entirely outside of the scope and purpose of the statutes of Illinois relating to homestead loan associations. It is not a building and loan association as known to our statute. *Rhodes et al. v. Missouri Savings Co.*, 173 Ill., 621. We do not deem the question raised in argument that the company does not fall within the building and loan statute of Minnesota as pertinent here, and we express no opinion upon it. For the purposes of this case we need go no further than to test the company by the statutes of this State, for if it does not conform in purpose and business methods to our laws, it can have no standing here as a building and loan association, under the rule of comity between states.

In *Stevens v. Pratt*, 101 Ill., 206, the court referring to section 26, chapter 32, R. S., said: "Where the general laws of this State provide for the organization of corporations, foreign corporations of like character doing business in this State, shall exercise no greater or different powers, and shall be subject to the same liabilities, restrictions and duties. The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law."

In the *Granite State Provident Association v. Lloyd*, 145 Ill., 620, the court after quoting the above language says: "We think this language clearly shows that under said section 26, when a foreign corporation of any kind comes into this State to transact business, it must conform to the laws of this State, if such exist, regulating similar corporations organized under the general laws of this State; also that no law of comity between this and other States is thereby violated; it being simply a law of regulation, and in no sense one of prohibition." See also *The St. Louis Loan & Inv. Co. v. Yantis*, 173 Ill., 321.

In the transaction before us there was no pretense of conforming to the regulations of the Illinois statutes. The man-

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ner in which the business between the company and Airey was conducted shows conclusively that neither party to the transaction contemplated a competitive bid for the priority of loan. Airey agreed with Lakore upon the terms of the loan and on January 15, 1891, paid the admission fee of \$24 which he thought was a commission to Lakore, the sub-agent of the company at Morgan Park, Illinois, for his services in negotiating the loan. The loan was referred to the general agent of the company, Starbird, who directed Lakore to close it up without waiting for the organization of the local board at Morgan Park. Starbird himself approved the security and directed Lakore to procure the abstract of title. Airey delivered his abstract to Lakore or the attorney for the company and executed the note and mortgage, and on the approval of the title by the attorney the securities were delivered and the money advanced. This was all done in Chicago. Airey attended no meeting of the board of directors and made no bid for the loan in the sense contemplated by the statute. He signed the so-called bid and subscribed for the 24 shares of stock and assigned them to the company, agreeing to continue payments of installments thereon until the stock matured or the loan was otherwise paid. He also agreed to pay the company a bonus of 50 per cent. of the stock as a premium for the loan. These conditions, together with six per cent. per annum interest on the loan for the whole time, were thus imposed upon the defendants unlawfully and arbitrarily, by private negotiations and contract without reference to any competitive bid for the priority of loan in open meeting of the board of directors, and made the transaction usurious under the laws of this State.

In *Borrowers' Building Ass'n v. Eklund*, 190 Ill., 257, the court in declaring the effect of section 11 of the Homestead Loan Association Act, said: "The statute does not by any means invest these associations with unrestricted authority to enter into private contracts with individual stockholders for interest or premiums without regard to the general laws limiting the rate of interest which may be lawfully contracted for. On the contrary there are but two modes by which such asso-

ciations may make loans of this privileged character. These modes of procedure are set forth in section 8 of the statute under which such associations have existence." The court, after quoting section 8, says: "These modes of making loans and contracting for interest by way of premiums were not declared by the legislature for the mere purpose of directing an orderly manner of business procedure for the associations, but for the purpose of operating as a restraint upon the power of such associations to enter into oppressive contracts for interest or gains for the use of their money."

The court holds that the transactions under review in that case were usurious, and that the association had forfeited the right to collect any interest whatever, but that only the sums loaned should be required to be repaid by the appellee because of the failure of the association to observe the provisions of the statute. To the same effect is *Jamieson v. Jurgens*, 195 Ill., 86.

The evidence clearly shows that defendant Airey had paid back to the company \$1,310.40, and therefore had paid to the company more than the amount loaned to him. Nothing was due on the mortgage at the time the bill was filed. Complainant Cobe received the securities subject to all equities between Airey and the company and is not entitled to the relief prayed. The decree is therefore reversed and the cause is remanded with directions to dismiss the bill for want of equity.

Reversed and remanded with directions.

Joseph Kirchheimer v. Thomas A. Barrett.

Gen. No. 12,229.

1. *ADMISSION—made by attorney competent.* It is competent to show that at a former trial of a cause the attorney of the adverse party made a certain admission and such fact may be established by calling the attorney who it is claimed made such admission.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge,

Kirchheimer v. Barrett.

presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed and remanded. Opinion filed March 6, 1906.

Statement by the Court. For some years prior to 1904 appellant and his brother Sigmund carried on business in Chicago as partners under the firm name of Kirchheimer Brothers, and during the years 1900, 1901, 1902 and 1903 appellee was in their employ as city salesman. The controversy in this case is as to whether Kirchheimer Brothers agreed to pay appellee any compensation for his services during the year 1903 other than a salary of \$1,200 which was paid him. Appellee brought a suit before a justice of the peace against Joseph and Sigmund Kirchheimer to recover compensation, in addition to his salary, for the year 1904, but only Joseph Kirchheimer was served with summons. Plaintiff had judgment before the justice and upon appeal by the defendant Joseph Kirchheimer to the Circuit Court, plaintiff had a verdict for \$200 and judgment thereon, to reverse which this appeal is prosecuted.

MORTON A. MERGENTHEIM, for appellant.

RICE & O'NEIL, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Appellee testified that he was employed by Kirchheimer Brothers early in January, 1903, for that year; that the agreement was that he should receive as his compensation for that year forty-five per cent. of the profits on sales made by him; that out of the gross profits on his sales ten per cent. should be taken by Kirchheimer Brothers for expenses and the remaining ninety per cent. divided equally, forty-five per cent. to the firm, and forty-five per cent. to appellee, but that in any event appellee should receive, as a guaranteed salary, \$1,200 for the year. Joseph and Sigmund Kirchheimer testified that the contract was, that appellee should receive a salary of \$1,200 for the year and that it was not agreed that he should have a percentage of the profits on his sales, or any compensation whatever other than said salary of \$1,200.

Appellee testified that appellant gave to him in January, 1904, a paper containing a statement of the amount of the sales made by the appellee during the year 1903, which was introduced in evidence by him at a former trial of the case in the Circuit Court, and called as a witness the attorney of appellant, who testified that subsequent to said trial, said paper was lost in his office, and that the copy produced by the witness was a substantial copy of the paper so lost. The copy of the paper so produced was then put in evidence by appellee and is as follows:

“Exhibit A for plaintiff.

January and February	1,717.10
March	1,307.10
April	1,452.20
May	1,776.02
June	1,254.09
July	1,060.35
August	1,949.10
September	1,315.43
October	1,049.74
November	897.77
December	1,194.17
	<hr/>
	14,973.13
Ret	849.31
	<hr/>
	14,123.82

(Endorsed): 3,600 profit.”

Appellant called as a witness Mr. Rice, the attorney of record of appellee and his counsel at the trial, and put to him the following question: “Q. Mr. Rice, did you at the former trial of this case admit that these figures I show you ‘\$3,600.00 profit’ were in the handwriting of Mr. Barrett?” to which question an objection was made upon the ground that evidence of an admission by the attorney of the plaintiff at a former trial was not admissible, and the objection

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was sustained and an exception taken. In this we think the trial court erred. In *C. B. N. P. R. R. Co. v. Shoup*, 28 Kansas, 395, Mr. JUSTICE BREWER said, p. 397: "An attorney is for the purposes of the trial, the agent of his client, and whatever he does and says in its progress, is *prima facie* the act and word of the client. If the plaintiff in this case had been a living person, and upon the trial had stated exactly what his attorney did state, no one would question but that proof of such statement might be given in any subsequent trial. It is doubtless often true that during the progress of a trial, and to hasten it, counsel waive the production by the opposite party of formal proof of some fact, intending to rest their case on some other matter; and this, which is done for the mere purpose of that trial alone, and for the sake of facilitating it, is not to be considered as a formal admission of the fact, binding in all subsequent progress of the case. But whether the consent or admission or waiver is to be considered as made for the purposes of that trial only, or as a general admission, is ordinarily a question of fact to be determined by the jury."

The same rule is stated in *Perry v. Simpson*, 40 Conn., 313, and 1 Greenleaf's Ev., sec. 186.

Whether the endorsement "\$3,600.00 profit" was upon the original paper when it was given to appellee by appellant was, in view of the issues in the case, a question of no little importance to appellant. If the endorsement was then upon the paper, that fact would tend to strengthen the contention of appellee that it was a part of the contract of hiring, that he should have some part of the profits made by his employers on his sales.

It is not a sufficient answer to say that the attorney of appellant testified that Mr. Rice admitted upon the former trial that the endorsement was written upon the paper by appellee. The paper was lost in the office of appellant's attorney, and to prevent any possible inference by the jury that it contained evidence unfavorable to appellant, as well as to establish beyond all controversy the fact that the endorsement was made by appellee, it was the right of appellant to

introduce any competent evidence tending to prove that the endorsement was made by appellee, after the paper had come into his possession.

The verdict is in our opinion against the clear preponderance of the evidence.

The testimony of appellee as to the contract of hiring is in direct conflict with the testimony of Joseph and Sigmund Kirchheimer.

Appellee testified that the contract was that Kirchheimer should deduct from the gross profits on his sales, ten per cent. of such profits for expenses, and divide the remaining ninety per cent. thereof equally between himself and the firm, and yet the salary of appellee \$1,200 alone, amounted to 33 1-3 per cent. of the gross profits on the amount of his sales \$3,600.

Under the contract as testified to by appellee, he was entitled to receive,
 45 per cent. of "\$3,600.00 profits"..... \$1,620.00
 of which he had been paid 1,200.00

leaving due him \$ 420.00
 and yet he brought his suit before a justice of the peace and thereby limited his recovery to \$200, and no explanation for such action on his part was given or offered at the trial.

The letter of appellee's attorney written to Kirchheimer Brothers in March, 1904, in relation to the demand for which this suit was afterwards brought by them, offered in evidence by appellant, should have been admitted.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

Seymour v. Stock Yards & Transit Co.

**Mattie Seymour, by next friend, v. Union Stock Yards
& Transit Company, et al.****Gen. No. 12,247.**

1. NEGLIGENCE—*what not, within rule of "allurement."* The maintenance of a clay bank not intrinsically dangerous does not come within that class of cases which may render the owner of land liable for injuries resulting to children arising from the maintenance upon their land of objects of allurement or attractiveness to children.

2. NEGLIGENCE—*what does not constitute.* It is not negligence for the owner of land adjoining a railroad track to fail to maintain a safe pathway upon the side thereof or to erect a barrier between the same and such track so as to safeguard children engaged in "tagging" passing cars.

3. PROXIMATE CAUSE—*what not.* The maintenance of a clay bank is not the proximate cause of an injury to a child who has ceased to play with the clay and has attempted to run upon the pile of clay alongside a moving train and in doing so falls under the car and is injured.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 6, 1906.

B. J. WELLMAN, for appellant; ARTHUR A. HOUSE, of counsel.

WINSTON, PAYNE & STRAWN, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment on a directed verdict for the defendants in an action on the case for personal injuries.

The right of way of appellee, the Union Stock Yards and Transit Company, is on the south side of 49th street, from Wallace west to Halsted street in Chicago. The right of way extended north from the north rail of the railroad track not less than six nor more than seven feet, and there was no fence between the right of way and the street.

Some weeks before the injury complained of, train loads

of clay to be used in elevating the railroad tracks were thrown off from flat cars by a steam shovel upon the ground north of the railroad track. The pile of clay thus made extended from east to west from Wallace to Halsted street, two blocks. It varied in height from two to four feet and covered most of the ground between the north track and the south line of the street, and possibly, at some places, extended into the street. The neighborhood was thickly settled and from the time the clay was unloaded until plaintiff was injured, numbers of children were in the habit of playing upon the pile of clay, making clay pies, cakes and other such things, and, at times, they stood upon the pile and threw clay at passing trains, and with sticks punched cattle and hogs in the cars. The clay was left in the position where it was placed by the steam shovel and its surface was rough and uneven.

The plaintiff was eight years old when he was hurt and thirteen at the time of the trial. He was playing upon the clay pile alone, and a train of about twenty-five freight cars of the Wabash Company, a lessee of the Stock Yards Company, passed west on the north track of that company, moving very slowly. Plaintiff stood up and began touching the passing cars with his left hand, then he ran along by the side of the train, touching the cars and when all of the cars but two or three had passed him, he slipped and fell under the cars and received the injuries complained of.

The case was tried in the Circuit Court upon "an amended and substituted declaration," against appellees and the Wabash Company, containing three counts. The first count averred that the Stock Yards Company owned said railroad and that the other defendants, as its lessees, operated trains over it. It alleged that the defendants had in the operation of their road, brought a pile of clay to the tracks at this point, and that it extended along the right of way parallel to the north rail of the north railway track, gradually rising to a height of about four or five feet at a point three or four feet north of said rail; that this clay pile constituted an attraction for small children who lived in great numbers in

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the neighborhood, and that appellees negligently failed to fence or wall the railway tracks or the dangerous and attractive premises, so that appellant was enabled to go upon the premises and did go upon them, and played on said clay bank; that appellant did not know the dangers of falling or being rolled under the trains; that a train operated by the Wabash Railroad Company over said tracks came past said bank and stopped preparatory to backing, and just before said train stopped and while it was moving slowly, appellant ran in play along on said bank of clay beside the train and stumbled and fell "upon aforesaid dangerous attraction" and rolled under the wheels of the train.

The second count set out an ordinance in relation to fencing railroad tracks, but as the ordinance was not admitted in evidence, and it is not argued by appellant that the court erred in excluding it, that count may be disregarded.

The third count averred in substance the same facts as set out in the first and that the defendants were bound to remove and level down said bank of clay for the protection of small children and plaintiff, but carelessly and negligently left the same, failed and omitted to do so, by reason of which the plaintiff, while playing thereon, stumbled and fell and was injured as set out in said first count.

The suit was dismissed as to the Wabash Company, and upon the trial an additional count was filed against appellees, which averred in substance the same facts as set forth in the third count, and further alleges that said bank of clay along said railway track extended outward therefrom and into said 49th street. That said bank of clay was an attraction for small children and that the plaintiff, while playing thereon, stumbled, slipped and fell and was injured as herein stated in other counts. That defendants knew or in the exercise of ordinary care should have known all of the foregoing facts and carelessly and negligently failed to level down or remove said clay bank.

To all the counts appellees pleaded not guilty.

It is not material to inquire whether any part of the clay was outside the right of way. At most, only a very small

part of it was upon the street and that part upon which plaintiff was, when he ran along by the side of the train, was certainly upon the right of way, for he was touching the cars as they passed when he slipped and fell.

"There is a class of cases which hold owners of land liable for injuries resulting to children although trespassing at the time, where, from the peculiar nature and open and exposed condition of the dangerous defect or agent, the owner should reasonably anticipate such injury to flow therefrom as actually happened." 1 Thompson on Negligence, 304.

The contention of appellant is that this case belongs to the class of cases above mentioned, commonly known as "turn table" or "allurement" cases. With this contention we cannot agree. A turn table, a cog wheel or any kind of machinery that may be put in motion by children, is attractive to them and is also dangerous. If left unguarded and unfastened the owner may reasonably anticipate that children will play with such machinery and will thereby be injured. The same is true of a pond of water with logs floating upon its surface; of a pile of lumber or other materials so defectively and insecurely laid and piled as to be in danger of falling. But the pile of clay in this case was not in itself unsafe or dangerous to children playing upon or with it. If the clay had contained any poisonous substance and the plaintiff while playing with it had been poisoned and injured; if it had been piled so high or in such a manner that it was in danger of caving in or falling and it had fallen upon plaintiff and injured him, then the case would be within the class of cases above mentioned. In all the cases of that class in which a recovery has been sustained, to which our attention has been called, the thing which constituted the allurement was dangerous and the injury to the plaintiff was caused thereby. In such case, if the circumstances are such that the owner of the premises on which such dangerous thing was, should reasonably anticipate that children would be attracted to such dangerous thing, and that if they had access thereto, they would or might be injured, the owner, by permitting such access to the dangerous thing, would be guilty of negli-

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gence and answerable in damages to a child injured by such negligence. In such a case there is a natural and probable connection between the negligence of the owner in permitting children access to such dangerous thing, and the injury thereby occasioned. Here the pile of clay which constituted the allurements was not dangerous in its nature, nor was the injury to the plaintiff caused thereby, but plaintiff quit playing with the clay, attempted to run upon the pile of clay alongside of a moving train and in so doing fell under a car, was run over and injured. There was no natural and probable connection between the act of leaving the pile of clay where it was, and the injury which the plaintiff sustained.

The rule which would make the defendants liable to the plaintiff in this case would make owners of land liable for remote and improbable injuries to children happening while trespassing thereon.

In our opinion no duty rested upon the defendants, either to construct a safe and secure pathway on the top or on the side of the pile of clay, for children to walk or run upon, while engaged in "tagging" passing cars, or to erect a barrier between the pile of clay and the railroad track, and their failure to construct such pathway or to erect such barrier did not amount to or constitute negligence.

The judgment of the Circuit Court will be affirmed.

Affirmed.

George B. Ross v. Mrs. L. T. Johnson.

Gen. No. 12,267.

1. **FAMILY EXPENSE**—*what is, within section 15 of Husband and Wife Act.* The test is not whether the article in question is necessary or useful. In this case a boniton and point lace waist costing \$200, held, a family expense within the meaning of the statute.

Action of assumpsit. Appeal from the Circuit Court of Cook County: the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 6, 1906.

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DEFREES, BRACE & RITTER, for appellant.

CAMERON & MATSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Appellee made for the wife of appellant a honiton and point lace waist at the agreed price of \$200, of which only \$25 was paid. In the Circuit Court appellee recovered a judgment for \$175 against appellant, to reverse which this appeal is prosecuted.

The statute provides that the expenses of the family shall be chargeable upon the property of both husband and wife in favor of creditors and that in relation thereto they may be sued jointly or separately. It is upon this statute alone that the liability of appellant in this case is predicated. In *Hyman v. Harding*, 162 Ill., 157-361, it was said: "Articles of clothing though purchased for and used exclusively by individual members are family expenses, as they contribute in a substantial manner by preserving health, and otherwise, to the general well being of all the members. It is equally apparent that an article is not a family expense, if it in no way conduces to the welfare of the family generally, even though it is, at times, used or displayed by the one for whom it was purchased in the family." And it was in that case held that a diamond ring purchased and worn by a wife was not a family expense.

The contention of appellant is, that as the waist in question was made of thin lace and was intended to be worn over a silk waist or lining it did not contribute to the health or general welfare of the wife and was not therefore a family expense. We do not think that the liability of a husband for an article of clothing bought by his wife, for her own personal use, depends upon the question whether such article is alone useful, or whether with utility is combined ornament or adornment. Under the rule contended for by appellant, a husband would be liable for a felt or straw hat bought and worn by his wife, but not for the ribbons or feathers bought and used to ornament or adorn the hat; he would be liable

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for a plain cloth or silk dress, bought by her, and not liable for the lace or braid used to trim, ornament, and adorn the dress, for neither the ribbons and feathers on the hat, nor the lace and braid on the dress, can be said to contribute in a substantial manner to the preservation of the health or physical well being of the wearer. Lace waists are articles of women's clothing in common use and are made with a silk lining or worn over a silk waist that takes the place of a lining. No doubt such waists are usually made of imitation lace, or of lace a kind and quality much less expensive than that of which the waist in question was made, but the waists made of expensive real lace, as well as those made of cheaper kinds of lace, are all articles of women's clothing and apparel.

We think that the conclusion arrived at by the jury and court in this case, implied by the verdict and judgment, that the waist in question, bought by appellant's wife for her own use, was a family expense, within the meaning of the term as used in the statute, was a proper conclusion upon the evidence, and the judgment of the Circuit Court will be affirmed.

Affirmed.

John Slattery v. W. Mack Stevens, et al.

Gen. No. 12,236.

1. **INCOMPETENT EVIDENCE**—*when admission of, will not reverse.* The admission of improper evidence will not reverse the finding of the chancellor if there is in the record sufficient competent evidence to sustain his finding.

2. **JUDGMENT**—*cannot be collaterally attacked for mere error.* In the absence of fraud, accident or mistake, injunction does not lie to restrain the collection of a judgment where the question raised by the bill and the evidence is as to whether there was a legal right of recovery.

3. **JUDGMENT**—*when fraud justifying setting aside, does not appear.* The failure of the plaintiff in an attachment proceeding to make an earnest effort to apprise the defendant of the pendency of an action against him does not constitute fraud such as will justify a court of equity in setting aside a judgment obtained upon regular service by publication.

4. **ATTACHMENT**—*when publication service in action of, not defective.* The jurisdiction of the justice is not destroyed in such an action by the failure of the constable to show in his return at what particular mail box he deposited the notice addressed to the defendant.

5. **GARNISHEE**—*who cannot complain of judgment against.* The defendant in an attachment proceeding cannot complain of the sufficiency of the answer of the garnishee to justify the entry of the judgment which was rendered against him.

Injunctive proceeding. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 6, 1906.

Statement by the Court. This is an appeal from an order of the Circuit Court dismissing for want of equity a bill filed in behalf of appellant seeking to restrain collection of a judgment rendered by a justice of the peace.

The bill of complaint sets forth that appellee W. Mack Stevens brought a suit in attachment November 8, 1902, before the justice to recover \$200 alleged to be due him from appellant for commissions on the sale of real estate, and that he garnisheed money in the hands of one Ida M. South to the amount of \$232.50; that South sent to the justice in response to the summons as garnishee a written statement to the effect that she owed appellant more than \$200 to become due October 15, 1903; that judgment was rendered by the justice against appellant November 24, 1902, when it is averred the justice had no jurisdiction of appellant's person or property; that pretended service was had upon appellant by a notice sent by mail to Brooklyn, New York, not addressed to him at any street number, when said Stevens knew or could have known appellant's actual address; that the street and number were omitted intentionally and fraudulently for the purpose of preventing appellant from having notice of the proceedings against him until the final judgment could be secured and that no actual notice of the pendency of said suit was given him; that he had no knowledge that the suit was pending until the 18th of October, 1903, a year after judgment had been rendered and execution issued against said garnishee,

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who herself, with others in the vicinity, knew the correct address of appellant, as Stevens well knew; that the notice sent by mail did not reach appellant; that when October 18, 1903, appellant learned the judgment had been rendered by the justice, the time for appeal as well as the six months allowed by law for suing out a writ of *certiorari* had expired, leaving appellant wholly without remedy in the premises except in a court of equity.

It is averred that the alleged claim of appellee Stevens was for commissions said to be due him for selling property formerly owned by appellant at Maywood, Illinois; that Stevens never made sale of any property for appellant and nothing was due him from appellant; that he was not a real estate agent, cannot rightfully maintain an action in Illinois for commissions, and that appellant has a full and absolute defense upon the merits to Stevens' claim; that said judgment was procured by fraud and that no demand was ever made upon appellant for payment of the commissions claimed. It is further alleged that final judgment was obtained in said suit before the justice November 24, 1902, whereas the money in the hands of the garnishee Ida M. South did not become due until October 15, 1903; that execution was issued by the justice on said judgment against the garnishee the day when her indebtedness to appellant became due; that said execution was illegal and void, because issued in violation of the statute of Illinois providing that execution shall not issue until twenty days after the debt shall become due without the required affidavit, and no such affidavit as the statute requires was made, and that Stevens is insolvent. It is also alleged that the costs were \$8.76, whereas the constable garnisheed in addition to the amount of the judgment, which was \$200, the sum of \$32.50 as costs. Appellant prays for an injunction, that the judgment be vacated and a new trial granted.

The defendant Ida M. South answers admitting the garnishment, states that Stevens inquired of her the address of appellant in Brooklyn, that she told him she did not know it, that she wrote appellant she had been garnisheed, and that

she bought the property in question from appellant on the advice and recommendation of Stevens after she had abandoned the idea of purchasing it. The answer of appellee Stevens denies all material allegations of the bill and need not be particularly stated. The constable Sheridan who is made one of the parties defendant to the bill, answers that he made service by publication according to law and mailed a copy to appellant at Brooklyn, New York, with return card on the envelope, and that the envelope was never returned to him.

CUNNINGHAM & CUNNINGHAM, for appellant.

HORTON & BROWN, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is first urged in behalf of appellant that the chancellor in the Circuit Court admitted improper evidence in behalf of appellees and rejected proper evidence offered on the part of complainant. It is to be presumed that the chancellor considered only such evidence as was competent. If we concede for the sake of the argument that evidence rejected might with propriety have been admitted, it was nevertheless evidence relating to the merits of appellant's defense against the claim of appellee Stevens for which the latter obtained judgment before the justice. This evidence as to Stevens' right to recover is conflicting, and while it may be doubtful whether in fact appellee Stevens was entitled to the commissions he claims or to any commissions, yet in the absence of fraud, accident or mistake that question must be deemed settled by the judgment of the justice, provided he had jurisdiction of the subject-matter and of the parties. In such case the judgment cannot be collaterally impeached for mere error. *Swift v. Yanaway*, 153 Ill., 197-203; *People v. Seelye*, 146 Ill., 189-206-221.

It is insisted, however, that the justice was without jurisdiction to render the judgment complained of, that he did not acquire jurisdiction in the manner provided by law. This contention is based upon the claim that the service by pub-

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lication under the statute was defective, that the return of the constable does not state, as the statute required, "the time when and the places where he posted and mailed copies" of the notice. (R. S. chap. 79, sec. 79.) The return is as follows: "Served the within notice by posting three copies thereof at three public places in the neighborhood of the within named justice, one at 125 South Clark street, one at 107 South Clark street, one at County Building, and mailing a copy of said notice, addressed to the within named defendant at his place of residence, this 8th day of November, A. D. 1902." It is true this return while stating when and where the constable posted the copies, does not specifically state precisely where he mailed the copy addressed to the defendant. In *Pomeroy v. Rand, McNally & Co.*, 157 Ill., 176-185, the court considered in a similar case a return in which the constable failed to state "the places where he posted and mailed copies," and it was held that such failure was not a defect fatal to the jurisdiction of the court. In the case at bar, as in that case, the return shows that the constable did all that was required of him by the statute, that he posted three copies of the notice at three public places in the neighborhood of the justice and mailed a copy addressed to the defendant at his place of residence, and the defect alleged in the present case is that the return does not state "what post office or mail box he dropped the notice in." As to that the Supreme Court says: "We do not think these omissions of sufficient importance to render the judgments of the justice of the peace and Circuit Court absolutely void." It is undoubtedly the rule that where jurisdiction is obtained by publishing a notice to parties interested, the statute must be strictly pursued and its provisions complied with. *Yaggy v. City*, 194 Ill., 88-90. Here the objection is not that the statute was not observed in the manner of giving notice, nor that the notice was not properly mailed, but that the return of the constable fails to show at what particular mail box out of thousands of mailing places in Chicago he deposited the notice addressed to the defendant at the latter's place of residence.

It is claimed that appellee Stevens did not make due inquiry to ascertain the proper address of appellant at Brooklyn, to which place the copy of the notice was mailed. There is evidence tending to show that Mrs. South, the garnishee, knew or had in her possession the means of ascertaining the exact place in Brooklyn where appellant's mail could be sent. There are circumstances stated in the bill, not however so far as we can discover from the abstract of the record proven by competent evidence, which might tend to create an impression that for some reason appellee Mrs. South was not averse to allowing Stevens to recover, and that she did not make any very active effort to help appellant in any way. This, however, falls far short of fraud. As a matter of law Stevens had a right to prosecute his claim in the manner allowed by statute and the mere fact that we may perhaps infer a probability that if he had made an earnest effort to do so he might have ascertained the exact street address in Brooklyn of appellant and failed to do so, is not evidence from which fraud may be inferred. If the statute as to service was complied with, it suffices. Strict adherence to the statute may sometimes work a hardship, but this alone does not authorize interference in equity with a judgment regularly obtained.

It is urged that the answer of the garnishee was insufficient to sustain the judgment. The garnishee is not complaining, however, and had she failed to answer at all, judgment could still have been entered against her on default. Nor do we find evidence tending to support the contention that the judgment of the justice was erroneous in the sense of being contrary to law. It appears to be such judgment as the law authorizes, and must be deemed conclusive upon the merits. In *People v. Seelye*, 146 Ill., 189, *supra*, on page 221 *et seq.*, it is said: "If a court has jurisdiction of the subject matter and the parties, it is altogether immaterial, where its judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity and can not therefore be collaterally impeached."

O'Hare v. City of Chicago.

Finding no material error in the order of the Circuit Court appealed from, it must be affirmed.

Affirmed.

Patrick J. O'Hare v. City of Chicago.

Gen. No. 12,257.

1. **ORDINANCE**—*when prima facie valid.* The city council has power to adopt a dram-shop ordinance which in addition to a fine provides as an additional punishment that a person convicted of its violation shall have his license revoked and shall not be permitted for a period of two years again to obtain such a license.

Prosecution for violation of dram-shop ordinance. Appeal from the Criminal Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 6, 1906.

Statement by the Court. Appellant was prosecuted before a justice of the peace for unlawfully maintaining and conducting a dram-shop or place where intoxicating liquors were sold, in alleged violation of section one of "An Ordinance for revising and consolidating the ordinances of the City of Chicago," enacted December 9, 1901. A jury of six men returned a verdict of not guilty. The case was then taken to the Criminal Court. The abstract is not carefully made. It fails to show the judgment appealed from, but it appears from what purports to be the bill of exceptions that a jury found appellant guilty and assessed a penalty of ten dollars, and that the court "gave judgment on the verdict against the defendant." Appellant was allowed an appeal to this court and filed an appeal bond.

Section one of the ordinance introduced in evidence and under which this proceeding was had provides, "that no person * * * operating, maintaining or conducting a saloon, dram-shop or other place in which * * * intoxicating liquors are sold or given away shall establish or maintain in connection with such saloon, dram-shop or other place, either as a part thereof or as an adjunct thereto, any

wine room or private apartment, the interior of which is shut off from the general public view by doors, curtains, screens, partitions or other device of any kind whatsoever." Section 2 prohibits any one from conducting a restaurant or victualling place to serve or permit to be served any intoxicating liquor in any private apartment maintained as an adjunct to such restaurant to any number of persons less than four unless all of such smaller number be of the same sex. Section 3 provides penalties for violation of the preceding sections, namely a fine not less than \$10 nor more than \$100 for each offense, and further provides as follows: "In addition to the penalty above fixed such person or corporation shall have his, her or its license revoked, and shall not be permitted to again obtain a license to operate, conduct or maintain a saloon, dram-shop, restaurant, cafe, dining room, ordinary or victualling place, or any other place at or in which malt, vinous or intoxicating liquors are sold, given away or otherwise dealt in within the limits of the city of Chicago for a period of two years from and after the date of the conviction of any such person or corporation of the violation of any of the provisions hereof."

M. R. HARRIS, for appellant.

HOWARD S. TAYLOR and JAMES DONAHUE, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It appears from the evidence that appellant maintained dining rooms on the second floor of the building on the first floor of which he conducted a saloon in which intoxicating liquors were sold. About 8 o'clock in the evening of October 23, 1903, three men and two women entered by a stairway in the rear of appellant's place of business and proceeded to the dining rooms on the second floor. One of the men accompanied by one of the women went into one room and another man and woman entered another room. These rooms were in size about ten by ten or twelve feet and were furnished with two or four chairs and a small round table. In one of the rooms the occupants ordered a drink of whiskey

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and a bottle of beer which was supplied by a colored waiter and was drank. When the waiter went out he closed the door. The colored waiter was answering and serving orders in both rooms. He went back and forth between the saloon down-stairs and the dining rooms above. In the room occupied by the second couple were two chairs and a small table. There also liquor was served by the colored waiter, but it was only tasted, not drank. The visitors to the place were apparently acting the part of detectives. At the conclusion of the evidence in behalf of the city, appellant's attorney moved the court to instruct the jury to find a verdict in favor of the defendant. The court denied the motion.

Evidence was then introduced in behalf of appellant tending to show that an ordinary restaurant was conducted on the second floor, the entrance to which, front and rear, are separate from the saloon. Appellant himself testified that he had no wine rooms as a part of his saloon nor as an adjunct thereto. There is, however, no material controversy over the facts. One of appellant's witnesses admits that drinks had been served to him and a party with him composed of both sexes in one of these rooms. The dining rooms, eight in number, on the second floor were conducted by appellant, who conducted also the saloon below, and it is clear that drinks from the saloon were furnished to patrons of the cafe or restaurant, whether such patrons ordered anything to eat from the restaurant or not. The evidence tends to show that the rooms on the second floor were in part at least maintained as wine rooms or private apartments used for such purpose, which were shut off by doors from the view of the general public, and that appellant permitted intoxicating liquors to be served in such private apartments maintained as a part of the restaurant to persons less than four in number and of different sexes, in violation of the ordinance.

It is contended that the ordinance is invalid and that it was error therefore to permit its introduction over appellant's objection. This contention is based upon the provisions of section 62, paragraph 96, art. 5, chap. 24 R. S., granting to

city councils the power to pass all ordinances, rules and regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines and penalties as the city council shall deem proper, provided no fine or penalty shall exceed \$200 and no punishment shall exceed six months in jail. It is said that this provision of the statute "leaves it free from doubt that penalties by the way of fine, was the mode intended to compel an observance of ordinances restricting, prohibiting and regulating the sale of intoxicating liquors." *City of Pekin v. Smelzel*, 21 Ill., 464-468. The charter provision of which this was said in 1859 was very different from that above referred to. It is claimed, however, that the ordinance in controversy is void, in that it provides in addition to the penalty by fine to be imposed upon conviction for its violation, that the person or corporation so convicted shall have his, her or its license revoked and shall not be permitted to again obtain a license to keep a saloon, dram-shop or restaurant, etc., within the city limits for two years after such conviction. The same section of the statute confers (paragraph 4, sec. 62, art. V, chap. 24) upon the city council the power "To fix the amount, terms and manner of issuing and revoking licenses;" and by paragraph 46 the city council is empowered "to license, regulate and prohibit the selling or giving away of any intoxicating liquors," etc. It is apparent therefore that the power to prescribe the manner of revoking licenses is specially conferred upon the city council by the same section relied on by appellant's attorney, prescribing the nature and amount of the fine or penalty and the term of imprisonment which the city council may impose to carry into effect the powers granted to cities and villages. The provision for revocation of licenses here called in question is strictly within the power given by said paragraph 4. It may be enforced by officers of the city charged with such duty. Such revocation is "in addition to the penalty" fixed by the ordinance and a consequence of conviction, not a part of the penalty to be assessed by the jury. *Ballentine v. State*, 48 Ark., 45-49. We are of opinion that the ordinance in question is a valid exercise by

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the city council of the powers granted. Among cases which support these views are *Wiggins v. City of Chicago*, 68 Ill., 372-378; *Schwuchow v. The City of Chicago*, 68 Ill., 444-447; *Launder v. City*, 111 Ill., 291-295; *The People ex rel. Morrison v. Creigier*, 138 Ill., 401.

Objection is made to the first instruction in that it told the jury if they believed from the evidence that appellant maintained at the time and place referred to as an adjunct to his dram-shop "any wine room or private apartment" shut off from general public view he should be found guilty. While a close analysis may find fault with the words "private apartment" as used in the ordinance and in the instruction, it is apparent from the connection that the words are intended to include private apartments of the nature of wine rooms, and there is no reason to suppose that the jury were misled thereby. It is apparent from what we have said that we do not deem it error to have refused to instruct the jury to find the defendant not guilty.

We have considered the other objections urged, but find no material error in the record. The judgment of the Criminal Court will therefore be affirmed.

Affirmed.

Henry M. Omensky v. Louis Gleske, et al.

Gen. No. 12,046.

1. **PREPONDERANCE OF EVIDENCE**—*what does not fail to establish.* The fact that there are but two witnesses to an issue and they contradict each other, does not necessarily fail to establish a preponderance of the evidence for the plaintiff.

2. **INSTRUCTIONS**—*when alleged error in, cannot be urged on appeal.* Objections to instructions cannot be urged upon appeal where such objections are not specifically pointed out.

Action commenced before justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed July 17, 1905. Rehearing denied October 3, 1905.

J. JULIUS NEIGER, for appellant.

No appearance for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellees and against appellant for the sum of \$70.55, rendered on appeal from the judgment of a justice of the peace. The appellees sued appellant for milk claimed by them to have been delivered to Mike Omensky, appellant's brother, by appellant's request and his undertaking to pay appellees therefor. Joseph Tomisky, one of the appellees, and the appellant, were the only witnesses. Joseph Tomisky testified, in substance, that Mike Omensky introduced him to appellant at the latter's saloon, in May, 1901, and appellant asked him if he could supply Mike with milk for the balance of the season, and he told him he thought he could, that appellees had the milk, if they could get suitable security, and appellant said that he was in business there and thought he was responsible and good enough for a month's milk, and told witness to let Mike have the milk from day to day, and to come to his, appellant's place, at the end of each month and he, appellant, would see that he got his pay for it. Witness testified that appellant paid him for the June and July milk, but did not pay him for 93 cans delivered to Mike in August, that there was some complaint about the August milk, and appellant said he wanted to see Mike before he paid the account and refused to pay it.

There is no contest as to the amount of the August milk, or its delivery, or the value of it.

Appellant denied positively that he told Tomisky to let Mike have milk from day to day and to come to him for his pay, and never ordered him to ship milk to or supply his brother with milk.

Appellant's counsel contends that as there was a direct contradiction between the witnesses, as to any agreement of appellant to pay for the milk, the appellees did not prove their case by a preponderance of evidence and there can be

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no recovery. We do not understand the law to be, that where there are only two witnesses and they contradict each other directly, as to vital facts, it necessarily follows that there is not a preponderance of evidence for the plaintiff. On the contrary, we understand the law to be, as stated in the first instruction given by the court at the instance of the appellees, namely, that while the plaintiff must prove his case by a preponderance of the evidence, such preponderance is not determined alone by the number of witnesses testifying. The jury are the judges of the credibility of the witnesses who testify in their presence and hearing, and of the probability or the reverse of their testimony, and obviously may credit the testimony of one and discredit that of the other. It appears from the evidence that appellees had been shipping milk to Mike Omensky, who apparently was in the milk business, for cash, and who wanted to buy by the month on credit, and that Tomisky was unwilling to let him have milk without the cash, on his own responsibility. Hence Mike took Tomisky to appellant. Under these circumstances there is certainly nothing improbable in appellant having told Tomisky to let his brother have the milk and he, appellant, would pay for it. We think, too, that the circumstance that appellant actually paid for the milk delivered to his brother in the months of June and July, is corroborative of Tomisky's testimony. Appellant admits having paid for those months, but says he paid his brother's money. But why did Tomisky apply to him for payment, instead of to his brother? Mike, who was present when the conversation occurred between appellant and Tomisky, was not called as a witness, nor his absence accounted for. Naturally, appellant, his brother, would be expected to call him. Why appellees would not wish to call him we think obvious.

In *Peaslee v. Glass*, 61 Ill., 94, Glass was the plaintiff and Peaslee the defendant. The testimony of Glass was directly contradicted by Peaslee and Peaslee's testimony was corroborated by that of another witness. Held, that the plaintiff could not recover. The court, commenting on a case where a plaintiff and defendant are the only witnesses,

and the plaintiff recovers, say: "Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant, but also by another witness, and there are no elements of probability to turn the scale."

In *Durant v. Rogers*, 71 Ill., 122, cited by counsel for appellant, three judges dissented.

Authorities are cited in regard to books of account as evidence, for what purpose we cannot perceive, as no books were put in evidence.

Appellant's counsel assigns as error the refusal of certain instructions asked by appellant, but the instructions are not argued. It is merely stated, in substance, in the printed argument of counsel, that the instructions should have been given, without any attempt to point out, in any way, errors in them, or how appellant was prejudiced, if at all, by their refusal. It is well settled that objections not relied on in argument must be deemed waived. *Gordon v. Commissioners*, 169 Ill., 510; *Inter-State B'g & L. Ass'n v. Ayers*, 71 Ill. App., 529, 541, and cases cited. An objection merely stated and not argued can hardly be said to be relied on. In *City of Chicago v. Spoor*, 91 Ill. App., 472, the court say: "It is not enough for counsel to say in his brief that the court erred in giving a specific instruction, or in the admission or exclusion of certain evidence, or that the judgment is excessive, or that the court should have sustained a motion for a new trial; but he should show how or in what way the particular ruling of the court was erroneous." On such general objection as is made in the case, we decline to examine critically each of the nine refused instructions for the purpose of ascertaining whether it is or not materially erroneous.

The judgment will be affirmed.

Affirmed.

Schumacher v. Wolf.

John C. Schumacher, et al., v. William H. Wolf.

Gen. No. 12,000.

1. FINDINGS OF CHANCELLOR—*when not disturbed.* The findings of the chancellor upon questions of fact will not be disturbed unless clearly and manifestly against the preponderance of the evidence.

2. PAYMENT—*when made at payor's risk.* The person obligated to pay a note secured by mortgage makes payment thereof at his own risk where he makes such payment without seeing the note.

3. HOMESTEAD LOAN ASSOCIATION—*what notice to.* Notice to the secretary of a homestead loan association is in law notice to such association.

4. EQUITABLE ASSIGNEE—*to whom required to give notice of rights under trust deed.* The rule requiring notice to be given by the assignee of a mortgage does not require it to be given to third persons unknown to the assignee, but only to the mortgagor.

5. SUBROGATION—*when doctrine of, cannot be invoked.* A defendant who has not by answer or cross-bill claimed the benefit of the doctrine of subrogation and who has not by assignment of error called in question the failure to apply such doctrine, cannot on appeal assert the right to the application thereof in his favor.

Foreclosure proceeding. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed October 16, 1905.

GEORGE W. HESS, for appellants.

J. G. GROSSBERG, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

October 20, 1903, appellee filed a bill against the Abraham Lincoln Building, Loan and Homestead Association, Mollie Schumacher, John C. Schumacher, Maude E. Hennan, Minna Paulsmeir and others to procure the release of a trust deed, alleged to have been fraudulently executed, can-

celled and set aside, and for a foreclosure of the trust deed. The Abraham Lincoln etc. Association, John C. Schumacher and Maude E. Hennan answered the bill, and Mollie Schumacher, by leave of court, adopted their answer, and replications were filed to the answers.

March 11, 1904, appellee filed a supplemental bill, alleging, in substance, that since the filing of the bill an interest note or coupon fell due. The cause was heard on the pleadings and on evidence produced in open court, and a decree was rendered substantially in accordance with the prayer of the bill, from which the Abraham Lincoln etc. Ass'n, John C. and Mollie Schumacher and Maude Hennan appealed.

Charles C. Schumacher, who died May 3, 1903, before the filing of the bill, John C. Schumacher and Henry Schumacher were brothers, Mollie Schumacher is the wife of John C. Schumacher, and Maude Hennan is the daughter of John C. and Mollie Schumacher. John C. Schumacher was, at the time of the transactions hereinafter mentioned, the owner of 90 shares of stock in the Abraham Lincoln etc. Ass'n, and his brother Henry was his clerk and was also his assistant in the secretaryship. Humboldt von Horn, against whom the bill was taken as confessed, was the attorney of the Abraham Lincoln etc. Association, and an intimate friend of John C. Schumacher. A knowledge of these relations is necessary to an intelligent understanding of the case.

May 5, 1892, Humboldt von Horn executed his promissory note for the sum of \$900, payable to his own order three years after the date thereof, with interest at the rate of seven per cent. per annum, payable semi-annually, and also executed six like promissory notes for the semi-annual interest. To secure the indebtedness so evidenced von Horn executed to Charles C. Schumacher a trust deed of lots 5 to 10, both inclusive, in block 46 in Schumacher & Graedinger's Addition to Chicago, in Cook county, Illinois. Von Horn endorsed the notes and delivered them and the trust deed to Charles C. Schumacher, the trustee. The trust deed was recorded May 11, 1892. John C. Schumacher was the

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owner of the premises described in the trust deed, and the mere naked legal title was vested in von Horn for John C. Schumacher's convenience. It is admitted by appellants' counsel that, apparently, the legal title was vested in von Horn for the purpose of procuring the loan of \$900 from his brother Charles, and by John C. himself; that von Horn had nothing to do with the transaction except as his friend. The premises, at the time of the execution of the trust deed, were subject to a prior mortgage to one Simpson Dunlap to secure payment of \$1,230. Shortly after the execution of the notes and trust deed by von Horn, they were sold by Charles C. Schumacher to appellee Wolf. This is admitted by appellants' counsel in his argument. May 4, 1901, von Horn executed an agreement extending the time of payment of the principal note three years, or until May 5, 1904, and at the same time executed six promissory notes for \$27 each, payable semi-annually, for the semi-annual interest, at the rate of six per cent. per annum, to fall due after the date of the extension.

Charles C. Schumacher, March 5, 1902, executed a release to Humboldt von Horn of the trust deed, which release was recorded March 18, 1902. May 9, 1892, von Horn conveyed by warranty deed the premises in question to Mollie Schumacher, the wife of John C. Schumacher, which deed was recorded June 14, 1894. August 15, 1902, Mollie and John C. Schumacher quit-claimed lots 5 and 6 in question to von Horn, and the latter, August 18, 1902, quit-claimed the same lots to Maude E. Hennan, the daughter of Mollie and John C. Schumacher. There was no consideration for either quit-claim. February 27, 1902, Mollie and John C. Schumacher executed a trust deed to August F. Schultz as trustee, conveying lots 7, 8, 9, and 10 in question, expressed to be to secure an agreement with the Abraham Lincoln Loan and Homestead Association, wherein said John C. Schumacher acknowledges that he has borrowed from said Association the sum of \$6,000, and agrees to pay the same according to the rules of the Association.

It is not contended that the decree is not sustained by the findings of the court, but that the decree is erroneous in finding the lien of the trust deed from Mollie Schumacher and her husband to August F. Schultz subordinate to that of the trust deed from von Horn to Charles C. Schumacher, purchased by appellee Wolf.

There can be no doubt, on the evidence, that the release of the last mentioned trust deed by Charles C. Schumacher, the trustee, March 5, 1902, was fraudulent, as the said Charles, at said date, must have known that he had transferred the note and trust deed to appellee. The court, in the decree finds that Charles C. Schumacher fraudulently, and without authority, released the trust deed, and that the Abraham Lincoln etc. Association had notice of this. It does not appear from the evidence that appellee Wolf gave notice either to von Horn or John C. Schumacher that he had purchased the note and trust deed, and it is not claimed on his behalf that he gave such notice. Therefore, appellants' counsel contends, on the authority of *Otis v. Cummings*, 31 Ill., 183, and other cases following that case, that appellee's lien must be subordinated to that of the Association. This, however, does not follow. The object of notice is to inform the party notified, and if the information is obtained in any way other than by formal notice, the object of notice is attained. Charles C. Schumacher and John C. Schumacher were brothers, and were in partnership from 1871 till 1888, and after the last date and 'up to 1892, John C. had dealings with Charles other than the one in question. He was familiar with Charles' business, knew that it was largely the brokerage business, and that he made investments for clients and customers, and sold papers. The following question was asked him and answer given: Q. "Was there anything different about this loan from any other loan that he made, that would lead you to the belief that this special money was his money?" A. "None whatever; my presumption would be, that he would make the loan and sell the paper, if he sold it at all."

The principal note, which John C. Schumacher claims

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he paid at Charles C.'s office, when he got the release, was not at that office. Wolf testified that he kept it at his house, and this is uncontradicted. John C. Schumacher substantially admits that he did not inquire for or see the note when he claims he paid it, and that he had not seen it up to the time of the hearing. Q. "It would not have been much trouble, right there at Charles' office, when you paid the money to him, to have gotten the note, would it?" A. "It would not have been any trouble, but I never thought of doing it. I never had occasion before to do it."

There was no evidence that John C. Schumacher ever saw the trust deed after its delivery to his brother Charles. The evidence tends to prove the contrary. Appellee Wolf produced at the hearing the trust deed, two interest notes, executed May 4, 1901, when the extension agreement was made, the extension agreement, and the principal note, and testified that he got those papers when they were made, and that they had never been out of his possession. This evidence is uncontradicted. Wolf also testified that he always got the interest, at Charles' office, from Henry Schumacher, and John C. testified that Henry was a clerk in Charles' office and represented Charles when he was not around. Wolf testified that Henry Schumacher paid the interest to him for the last time in November, 1902, and that May, 1903, John C. Schumacher paid him the interest. Henry Schumacher produced a certain account book of his brother Charles and testified that, from inspection of it, he would say that the last payment of interest was December 1, 1902, thus substantially corroborating Wolf. It is to be observed also that the semi-annual interest fell due in the months of May and November. Thus we have Henry Schumacher, brother and clerk of and representing Charles, paying interest to appellee about eight months after the execution of the release, and John C. Schumacher doing likewise about fourteen months after the execution of the release.

Wolf was never notified that his note was paid, although Charles C. Schumacher's books show a credit to him March

5, 1905, of \$927, and the evidence shows that the principal note and some of the interest notes have not been paid, and that Wolf never knew of the release until June, 1903.

Summarizing, the evidence discloses these facts: Charles C. Schumacher released the trust deed, well knowing that appellee Wolf was the owner and in possession of the principal note and the unpaid interest notes. John C. Schumacher was familiar with the business of his brother Charles and knew that he sold securities, and his presumption was that, ordinarily, he would sell the note and trust deed in question. He did not see, nor did he request to see, nor did he inquire about the said note or trust deed. Eight months after the execution of the release Henry Schumacher, clerk and representative of Charles, in the latter's business, paid appellee Wolf the semi-annual interest then due on the note. Fourteen months after the execution of the release, the appellant, John C. Schumacher, paid appellee Wolf the semi-annual interest then about due. On this state of facts, the learned chancellor was asked by appellants to believe that John C. Schumacher, in good faith, paid the principal note and all interest due thereupon, believing that his brother Charles was the owner of the note. To believe this seems to have overtaxed the credulity of the learned chancellor. In *Hess v. Killebrew*, 209 Ill., 193, 200, the court say: "Where the trial court, in a trial without a jury, has had an opportunity of seeing the witnesses and of hearing their testimony as it is delivered orally, the findings of such court upon mere questions of fact, when the testimony is conflicting, will not ordinarily be disturbed, on appeal, unless such findings are clearly and manifestly against the preponderance of the evidence. *Lane v. Lesser*, 135 Ill., 567; *Burgett v. Osborne*, 172 id., 227; *Delaney v. Delaney*, 175 id., 187; *Phelan v. Hyland*, 197 id., 395."

We cannot say that the finding of the court that John C. Schumacher knew that the note had been assigned by his brother Charles, is manifestly against the weight of the evidence. On the contrary, we think the court's finding

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amply sustained by the facts proven. John C. Schumacher did not testify that he believed the note had not been assigned when he claims to have paid it. He was questioned and answered as follows: Q. "As a matter of fact, you understood your brother was doing a brokerage business?" A. "Yes, sir." Q. "And was not loaning his own money?" A. "Well, he loaned his own money so far as I knew, and then sold the papers afterwards. *Whether he owned this paper I did not know.*"

If, as John C. Schumacher claims, he paid the note at the time he received the release, without seeing the note, which last the evidence shows and he admits, he paid it with notice that Charles C. Schumacher had no authority to receive payment of it. *Fortune v. Stockton*, 182 Ill., 454, 462. The court found that "at the time of the execution, delivery and recording of the release aforesaid, said Association had notice that the note of Humboldt von Horn, secured by trust deed of May 5, 1892, was unpaid and uncanceled, and that said release deed was executed and recorded without authority, on the part of said Charles C. Schumacher, and without authority from the complainant, William H. Wolf, and was in fraud of the latter's rights and equities."

A corporation is a mere political entity, bodiless and soulless, and can only act, receive notice or know by or through its agents or officers, and the knowledge of John C. Schumacher, the secretary of the appellant, was, in law, the knowledge of the Association. *Inter-State B'g & L. Ass'n v. Ayer*, 177 Ill., 9. But it was only necessary that John C. Schumacher, himself, should have notice of the assignment. He was the real owner of the lots and must, in equity, be regarded as the grantor in the trust deed, and the rule requiring notice to be given by the equitable assignee of a mortgage does not require it to be given to third persons unknown to the assignee, but only to the mortgagor. *Schultz v. Sroelowitz*, 191 Ill., 249.

At the time of the assignment to appellee Wolf, the Abraham Lincoln etc. Association had no interest in the prem-

ises. John C. Schumacher testified, in substance, that he applied to the appellant, the Building and Loan Association, for a loan of \$6,000, and obtained the loan, and that the money which he claims he paid to his brother Charles, when he obtained the release, and the balance due on the prior Dunlop encumbrance was paid from the proceeds of the loan, and he only received from the Association the balance of the \$6,000.

Appellants' counsel say that there is no evidence that John C. Schumacher knew that von Horn executed the extension agreement. This certainly, if true, does not affect the question of John C.'s knowledge of the assignment, but we think it is not true. Von Horn, the agent and trustee of John C. Schumacher, who executed the principal note, and the trust deed, executed the extension agreement and also executed and endorsed the new notes for the semi-annual interest. Wolf testified that he received these notes when they were made, and that all of them which were paid, with the exception of the one paid to him directly by John C. Schumacher, were paid at Charles C. Schumacher's office by Henry Schumacher, Charles' brother, clerk and representative. The first interest notes were payable semi-annually at the rate of 7 per cent. per annum, and therefore were for \$31.50 each. The new series were, by the extension agreement, at the rate of 6 per cent. per annum, and, therefore, for \$27 each. The old interest notes for \$31.50 each were paid at Charles' office by his clerk, Henry, and, as has been said, some of the new ones were paid by Henry and one by John C. Schumacher. Henry and John C. Schumacher, as business men, must have observed, by the difference between the former and latter rate of interest, that there must have been some new agreement, and the presumption is, as we think, that John C. Schumacher authorized the extension, which was for his benefit.

Lastly, appellants' counsel contends that, on the hypothesis that the court did not err in decreeing the foreclosure of the von Horn trust deed, the appellant Association should have been subrogated to the rights of the holder

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of the Dunlop trust deed. The Association does not assert such right in its answer, nor did it file a cross-bill praying it, nor is the failure to allow it assigned as error. Under these circumstances, the Association is not in a position to raise the question of its right to subrogation here. *Berry v. City of Chicago*, 192 Ill., 184, and cases cited.

The decree will be affirmed.

Affirmed.

General Wilmington Coal Company v. Finance Company of Pennsylvania.

Gen. No. 12,066.

1. CORPORATION—*when need not comply with act of May 26, 1897.* A foreign corporation need not comply with the act of May 26, 1897, where the business done by it in this State was that of another corporation which had duly complied with such act.

Action of debt. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed October 16, 1905.

EDMUND S. CUMMINGS, for appellant.

M. H. BOUTELLE and FRANK W. WELCH, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellee sued appellant in debt, on a judgment rendered in its favor against appellant in the Circuit Court of La-Crosse county in the State of Wisconsin, and recovered judgment in the Superior Court for the sum of \$941.56, from which judgment this appeal is. The case was tried by the court, without a jury, by agreement of the parties. The appellant pleaded *nul tiel record, non debet* and a special plea, averring, in substance, that the plaintiff (appellee here) was a corporation organized under the laws of Pennsylvania prior to July 1, 1897, and that on said day and

ever since, it had been doing business in this State without having filed in the office of the Secretary of State of Illinois a copy of its charter and articles of incorporation, etc., in short, that it did business in this State contrary to the provisions of the act of May 26, 1897, in force July 1, 1897, which act provides, among other things, that no foreign corporation which shall fail to comply with its provisions can maintain any action either legal or equitable in any of the courts of this State. Hurd's Rev. Stat. 1903, p. 486. The act was amended, by act approved April, 1899, in force July 1, 1899, and, as amended, contains substantially the same provision, as to the right to maintain a suit, as the original act. Hurd's Rev. Stat. 1903, p. 486. Appellant's counsel says, in his printed argument, that appellant relies solely on the provisions of the statute, so that the only question to be considered is, whether appellee was, before the suit was commenced, May 7, 1900, doing business in this State contrary to the provisions of the amendatory act in force July 1, 1899. The appellant, in support of its special plea, put in evidence a contract between the Philadelphia & Reading Coal & Iron Co. and appellee, which is too lengthy to be set out, or referred to, in all of its numerous details, in this opinion. The contract constitutes appellee the agent of the Philadelphia & Reading Coal & Iron Co. for the sale of the latter's coal, and the collection of bills for coal sold by appellee, and the transmission to the Philadelphia & Reading Co. of moneys collected by it for coal, etc., and provides for the payment to appellee of a salary for its services as such agent, and the evidence shows that appellee did business here solely as the agent of the Philadelphia & Reading Co. After careful reading and consideration of the evidence our conclusion is, that appellee's business in this State, so far as the evidence discloses, was the business of the Philadelphia & Reading Co., and that, in doing such business, it acted as the agent of that company, in pursuance of the contract in evidence. It was stipulated on the trial, that the Philadelphia & Reading Coal & Iron Co. is a corporation organ-

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ized under the laws of the State of Pennsylvania, and that, prior to the happening of the matters and things on which the judgment sued on was based, it had complied with all the provisions of the act of this State with reference to foreign corporations doing business in this State. The business done in this State being that of the Philadelphia & Reading Co., compliance by it with the act of 1897, as amended, was sufficient, and such compliance was not required by appellee, its agent.

We find no reversible error in the holding or refusal of propositions presented to the court as propositions of law.

The judgment will be affirmed.

Affirmed.

Rosalie G. Amos, et al., v. American Trust & Savings Bank, Conservator.

Gen. No. 12,084.

1. FINDINGS OF CHANCELLOR—*when not disturbed.* The findings of the chancellor upon questions of fact will not be disturbed on appeal unless clearly and manifestly against the weight of the evidence.

2. AGENT—*insane person without power to appoint.* An insane person has no power to appoint an agent whose acts are binding upon him.

Bill to cancel promissory note and trust deed. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed October 16, 1905.

HELMER, MOULTON & WHITMAN and GEORGE FRANTZEN, for appellants.

JOHN J. KNICKERBOCKER, for appellee; JOHN W. SMITH, of counsel.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

The appellee, as conservator of the estate of Joseph J. Miller, an insane person, filed a bill against Rosalie G. Amos, John E. Amos, Jr., her husband, and Henry W. Price, successor in trust of John E. Amos, Jr., praying for the delivery and cancellation of a certain promissory note and trust deed of certain premises to secure the same, on the ground that the note and trust deed were executed by Joseph J. Miller when he was insane. The cause was heard by the court on the pleadings and evidence produced in open court, and the court, in its decree, found that April 28, 1903, Joseph J. Miller was, on the verdict of a jury, adjudged to be insane by the County Court of Cook county, and that court thereupon appointed appellee the conservator of said Miller's estate, and that appellee accepted said appointment, etc.; that for many years prior to April 28, 1903, said Miller was the owner of certain real property described in the decree, situated in Cook county, Illinois; that April 22, 1903, there was placed on record a trust deed of date April 8, 1903, purporting to have been executed and acknowledged by said Miller, and to convey the said described real estate, in trust, to secure the payment of a promissory note of date April 8, 1903, payable to the order of Rosalie G. Amos, for the sum of \$4,000, with interest at the rate of 6 per cent. per annum, and that said trust deed was filed for record April 22, 1903, at three o'clock p. m.; that, at the time of the execution and delivery of said promissory note and trust deed, said Joseph J. Miller was insane and unable, for want of mental capacity, to execute the same, and had been, for several years prior to the execution of said note and trust deed, mentally incapable of contracting; that the defendants, John E. Amos, Jr., and Rosalie G. Amos, had notice and knowledge of the insanity of said Miller, at the time of the execution and delivery of said note and trust deed, and that the procuring the execution and delivery of said note and trust deed was fraudulent. Following these findings the court adjudges and decrees the cancellation of the note and trust deed, and confirms the title of Miller to the premises described in the trust deed.

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The main contention of counsel for the appellants is, that the decree, in finding that Joseph J. Miller was insane and mentally incapable of contracting at the time of executing the note and trust deed, is contrary to the weight of the evidence.

The evidence as to the mental condition of Joseph J. Miller was conflicting, as it usually is in cases of this class, and it was the province of the chancellor, in this conflict of the evidence, to determine the truth of the matter. The rule, when a cause is heard as this was, and the findings of fact by the chancellor are questioned, and the reasons for the rule are thus stated in *Van der Aa v. Van Drunen*, 208 Ill., 115: "On the whole record we do not see how the chancellor could have found otherwise than he did; but even if we were in doubt as to the correctness of the conclusions reached by the trial court as to the facts established by the evidence, according to the well established rule of this court we would not be justified in setting aside the decree unless, from a review of the record, we were able to say that the decree of the chancellor was clearly and palpably erroneous. This case was tried before the chancellor, and as we have so often said and as is patent to everyone, the trial judge, in cases of this kind, has opportunities for correctly weighing the evidence and arriving at the truth far superior to our own, which fact this court is bound to take into consideration and give due weight thereto when called upon to review a decree." Citing numerous cases.

We have carefully read all the evidence, and think it cannot reasonably be held that the finding of the court that Joseph J. Miller was mentally incapable of contracting, at the time of the execution of the promissory note and trust deed in question, and for several years before that time, is clearly and palpably erroneous. Our conclusion from the evidence is, that said finding is well supported by the testimony of appellee's witnesses, several of whom had known him longer and more intimately, and had much better opportunity for observing him than any of the witnesses for appellants. It appears from the evidence, and

is not controverted, that for about thirty years prior to the time of the execution of the note and trust deed, Miller had been afflicted with epilepsy, and that he frequently fell down and became rigid and unconscious, and that, on recovering from such fit or spasm he would not be conscious of its having occurred, and the testimony of those nearest him, and best acquainted with him, and who, therefore, were best qualified to testify intelligently to the apparent effect of the disease on him is, that for years prior to his having been adjudicated insane his physical and mental condition was continuously growing worse, until finally he became a physical and mental wreck, incapable of taking care of himself or his property, or disposing of the latter. Mr. Edwin A. Potter, president of the American Trust & Savings Bank, and who was formerly a member of a firm engaged in commercial business, testified, in substance, that he had known Joseph J. Miller from June, 1872; that he was in the employ of witness' firm in 1872, and continued in its employ and in that of its succeeding firm until 1889, in which latter year witness quit the firm; that between 1872 and 1889 he saw Miller very frequently and also saw him after 1889, sometimes once a week, sometimes every two or three days; that from his earliest recollection of him he was subject to epileptic fits, falling on the street or floor unconscious; that he saw him have such fits very many times; that the attacks grew worse as he grew older, and destroyed his capacity for business, and that witness could observe the waning of his memory and intellect; that in 1886 the firm, on account of his mental condition, discharged him, but in 1888, he being better, they took him back again, when he traveled one year for the firm, but the firm finding that he was not competent to do the business, again discharged him. This witness further testified: "I took up consideration of his condition ten or twelve years ago with his kinspeople, his brother, Charles S. Miller, and his brother, James H. Miller. I expressed the opinion that those who are most interested in him, his brothers and sisters, should take some steps to preserve his business and

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take care of it. Some foolish investments he was making led to absolute loss, and he was getting into quarrels wherever he would go, on a street car or train." In answer to a question the witness said: "Do not think he was ever competent, at any time during the last ten years, to transact business successfully or intelligently."

Other witnesses for appellee corroborated Mr. Potter's evidence as to the gradual impairment of Miller's intellect, by reason of his disease, among whom were his brother, Charles S. Miller, two sisters who lived in the same house with him for years next prior to the latter part of November, 1902, and Silas S. Willard, who was Joseph J. Miller's attorney for twenty-five years.

The evidence also shows that, by reason of his disease, his disposition completely changed, so that in his latter years he would do and say things which in his normal condition, before the disease had seriously affected him, he would not do or say.

Mr. Willard's evidence, which is corroborated by that of Miller's sisters and is not controverted, is: "He was of a very litigious nature, lately more than when I first knew him. He changed in his language and apparent disposition in later years. When I first knew him he was mild, pleasant, amiable, gentlemanly, very companionable; but in later years he was in trouble all the while with somebody, and always going to sue somebody for enormous damages."

Charles S. Miller, brother of Joseph J., after testifying that he had believed, for the last fifteen years of his life that Joseph was incapable of transacting any business, testified as follows: "It was this way: his terrible disease that had afflicted him so many years, had been gradually wearing his mentality and his body away, by degrees, so that it became simply an instance of a man without brains or judgment to guide his motives. He had many, many vagaries all the time, all the time. Before Judge Carter, on his trial, he asserted that he did not part with any of this Greenwood Avenue or Humboldt Park property. We had certified copies of the conveyances, showed them to my

brother on the trial, asked if he had ever made those conveyances, each one of them. He said no. Showed him some original deeds; he recognized his signature, but said he did not do it." That the conveyances mentioned were actually made by Joseph J. Miller is not questioned. The evidence shows that between January 14 and April 1, 1903, Joseph J. Miller sold and conveyed to different persons about fourteen lots situated in the city of Chicago, and the evidence tends to prove that these lots were hurriedly placed on the market and were sold for very much less than their market value. The court was warranted by the evidence in believing that there was a very considerable pecuniary sacrifice in the sales of the lots, although there is a conflict in the evidence as to their market value. The evidence also tends to prove that he received quite a large sum from the sale of these lots, that he owed little or nothing, and that he did not need to borrow any money; also that after he was adjudged insane no money or personal assets belonging to him could be found, although search and inquiry were made at such places as the same would be likely to be, if in his possession, or deposited by him.

Counsel for appellants further contend that the court erred in finding that the appellants had knowledge of the mental incapacity of Joseph J. Miller, at the time of the execution of the promissory note and trust deed. It is apparent from the evidence that the trust deed, although dated April 8, 1903, was not executed or acknowledged until April 22, 1903. Neither the note nor the trust deed is abstracted, but referring to the record we find that the trust deed is certified by "Robert H. Mueller, Notary Public," to have been acknowledged before him April 22, 1903. Robert H. Mueller, called as witness, testified that April 22, 1903, Mr. Amos called at the office of the Chicago Title and Trust Company, where witness was employed, and introduced to him Joseph J. Miller, whom he says he had never before seen, and asked witness to write in the trust deed the description of the premises intended to be conveyed, namely, lot 1, block 41, in Hyde Park Subdivi-

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sion, in sections 11, 12 and 14 in township 48 north, range 111 east of the 3rd principal meridian, which he did; that the deed, with the exception of the description, had been theretofore prepared, and that Amos asked him to take the acknowledgment of the deed, which he did. On cross-examination the witness said that Miller signed the trust deed in his presence, and that Amos took it away with him. This evidence is uncontradicted and is conclusive that the trust deed was executed and acknowledged April 22, 1903. It was filed for record the same day. April 22, 1903, was the day on which the petition was filed in the County Court, alleging the insanity of Joseph J. Miller, and praying an inquisition and the appointment of a conservator of his estate. It appears from the evidence that John E. Amos, Jr., is a practicing attorney. He became acquainted with Joseph J. Miller under rather peculiar circumstances. He was the attorney for a Mrs. Green in a suit by her against Joseph J. Miller, in the Circuit Court of Cook county, for trespass, in which the damages were laid at \$20,000. In June, 1902, he appeared at the office of Charles S. Miller, Joseph J. Miller's brother and attorney in the suit, with notice to have the case placed on the short cause calendar. Charles S. Miller testified that he told him of his brother's physical and mental condition, and the number of years of his infirmity, and said to him: "If you insist upon serving this notice upon me, I will make an affidavit of it, and go before court, at the time that you seek to have this placed upon the short cause calendar, and see if I cannot keep it off." Amos then withdrew the notice. Subsequently, about October 27, 1902, he served notice on Charles S. Miller, that on October 28, 1902, he would move the court for leave to withdraw his appearance as attorney in the Green suit. Charles S. Miller testified as follows, as to what occurred when the last notice was served on him: "I again went over with him my brother's mental condition; talked, probably, half an hour; detailed his condition, to the best of my ability, for fifteen or twenty years up to that moment; told him that my brother had no judgment,

no reason; that he had lost his mind." The witness, Miller, further testified that Amos, pursuant to the notice, withdrew his appearance in the Green suit, and shortly thereafter came to his, Miller's office, with a request from witness' brother to deliver to Amos any abstracts or papers of his brother which he might have, when he told Amos that he had none, and again went over with him the matter of his brother's mental condition, when Amos said that he had become Joseph's attorney and intended to take care of his business; that he wanted Mr. Miller as a client.

John E. Amos, Jr., testified that Charles S. Miller did not, at any of the conversations between them, intimate, in any way, that his brother was insane or unable to transact business. In this conflict, it was the province of the court to decide which spoke the truth, Amos or Charles S. Miller. The latter further testified, that, when he found that his brother was rapidly disposing of his property, he prepared and placed on record, two days before the filing of the trust deed for record, an affidavit of his brother's mental condition. If the physical and mental condition of Joseph J. Miller was as described by appellee's witnesses, and if, as the court found, properly as we think, "that he had been mentally incapable of contracting for several years prior to the execution of the said trust deed and promissory note," it is hardly within the range of possibility that John E. Amos, Jr., who was intimate with him, as his attorney, and with his property and affairs, since the latter part of October, 1902, did not know of his mental incapacity, and if Charles S. Miller informed him of his mental condition, which we think the court was warranted in believing, there can be no doubt of his knowledge that Joseph J. Miller was mentally incapable of transacting business when he signed and acknowledged the trust deed.

It appears from the evidence that Mrs. Amos had no direct personal communication with Joseph J. Miller in respect to the loan evidenced by the promissory note; that only Mr. Amos and Joseph J. Miller acted personally in the transac-

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tion; and it is contended by counsel for appellants that Mr. Amos acted solely as the agent of Joseph J. Miller, and that, as Mrs. Amos had no actual knowledge or notice of the mental incapacity of Joseph J. Miller, the appellee is not entitled to relief, without returning the money loaned. The proposition that Mr. Amos was the agent of Joseph J. Miller necessarily assumes as a premise that Joseph J. Miller was mentally capable of contracting. But the finding of the court, which we approve, is that he was not. An insane person, or one mentally incapable of contracting, is also incapable of appointing an agent to contract for him. To hold otherwise would be to hold that an agent, acting for and in the name of an insane or mentally incapable person, could bind such person when he could not bind himself; that one may delegate to another, power which he, himself, has not. Such is not the law. Story on Agency, 9th ed., Sec. 6; *Dexter v. Hall*, 15 Wall., (U. S.) 9. John E. Amos, Jr., therefore, cannot be regarded as the agent of Joseph J. Miller in the transaction in question. Mrs. Amos knew nothing of the value of the premises described in the trust deed. Her own testimony is, in substance, that she could not say she had much knowledge of the property, except what she learned from her husband.

Mr. Amos took the trust deed, after it was executed and acknowledged, April 22, 1903, in the office of the Title & Trust Co., and it was filed for record in the recorder's office the same day, evidently by him. He filled up the check which Mrs. Amos signed for \$4,000, the money loaned. He drafted the trust deed, all except the description of the premises, which he procured to be filled in by Robert H. Mueller, the notary, and he only, so far as appears from the evidence, passed on the sufficiency of the security. We think it a fair inference from the evidence that he acted as his wife's agent in making the loan, and, if so, his knowledge of the mental incapacity of Miller to contract is, in law, her knowledge. *Nash v. Classen*, 163 Ill., 409, 414. Appellants having had knowledge of the mental incapacity of Joseph J. Miller before and at the time of the execution of

the promissory note and trust deed, cannot invoke the aid of a court of equity to compel the return of the money alleged to have been loaned. *Ronan v. Bluhm*, 173 Ill., 277, 287-8. When we consider the amount of money which the evidence shows that Joseph J. Miller received on the sales of lots between January 14 and April 1, 1903, and the loan of \$4,000 which it is claimed he received on the check of Mrs. Amos, and the fact that after April 28, 1903, when appellee was appointed conservator, no money or personal property belonging to his estate could be found, the conclusion that he either lost or wasted his money, by reason of mental incapacity, or fell among thieves, is inevitable. The evidence tends to show that the amount which was paid in cash on the sale of Joseph J. Miller's lots, plus \$4,000, the amount of the loan, was at least \$8,300.

But it is claimed that from the \$4,000 loaned, Mr. Amos expended about \$500 for taxes on Miller's property and for insurance. Appellants put in evidence five tax receipts, each of date April 24, 1902, and running to Joseph J. Miller, the amounts of which aggregate \$449.44; also two receipts for insurance, each dated April 11, 1903, one for \$30 on houses 5427 and 5429 Washington avenue, and one for \$56 on house No. 3011 Cottage Grove avenue, both running to "Mr. Amos." John H. Haskell, called by appellants, testified that April 8, 1903, he was at the State Bank in Chicago, with Amos and Joseph J. Miller; that the latter put a check in and drew considerable money, and he saw him give Amos a \$500 bill and a \$50 bill, and heard him say to Amos, "You go over and take care of the taxes and I am going down to see Mr. Potter." We are not favorably impressed by the testimony of this witness. This was all the evidence in support of the claim that Amos paid the taxes. The paying teller of the bank testified that the check was presented April 8, 1903; that he paid the currency on it to Miller; that Amos was with Miller, and that they went over to a counter in the bank, apparently to count the money; that he did not see who counted it, and did not know who left the bank with it. In view of the uncontra-

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dicted fact that the trust deed was not executed or even filled out until April 22, 1903, it seems highly improbable that Amos, a lawyer, would have given to Miller a check for his wife's money and have permitted him to cash it April 8 and take the money away with him. If the check was in fact paid April 8, is it not probable that Amos retained the money at least until the trust deed was executed? There is no evidence that Amos actually paid the taxes. How he came to pay for insurance or who was liable to pay does not appear.

The decree will be affirmed.

Affirmed.

Provident Savings Life Assurance Society of New York v. Joseph B. Marshall, Administrator.

Gen. No. 12,068.

1. **INSURANCE POLICY—*who proper plaintiff to recover cash surplus of premiums.*** The assured, not the insured, is the proper plaintiff to recover a surplus arising from premium payments which are agreed to be returned in cash, where the promise to pay contained in the policy is made to the assured and not to the insured.

2. **INSURANCE POLICY—*how construed.*** An insurance policy will be construed most strongly against the insurer.

3. **INSURANCE POLICY—*what does not give right to apply surplus in diminution of mortuary premiums.*** Held, from the particular language of the policy in question in this case, that the insurance company had no right, without the consent of the insured or the assured, to apply the surplus of premiums in diminution of the mortuary premiums.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed October 16, 1905.

Statement by the Court. August 7, 1885, appellant Society issued its policy upon the life of Henry V. Marshall, by which it promised to pay to "Amanda C. Marshall,

wife of Henry V. Marshall, the assured, under this policy, or to the legal representatives or assigns of said assured, in the city of New York, the sum of \$5,000 within 90 days after due notice and satisfactory proof of the death of Henry V. Marshall of Maywood, Cook county, Illinois, the insured under this policy, provided such death shall occur on or before twelve o'clock noon on the 7th day of November 1885."

The policy also provides that if the assured shall pay each quarter of each year a mortuary premium as called for by the Society in accordance with the schedule of rates printed on the back of the policy, and also an expense charge of 75 cents on each \$1,000 insured therein, the insurance shall continue in force. It also provided that "seventy-five per cent. of each mortuary premium paid hereon will be at once deposited in trust in the Hanover National Bank of New York, or such other bank as may be designated by the Society, and shall constitute the death fund to be used solely in settlement of death claims. The residue of each mortuary premium will be deposited with the Farmers' Loan & Trust Company of New York, or invested in securities authorized by law, for investments in trust companies, for the guaranty fund additional to the capital and as a further protection to policy-holders. The full share of the surplus thus obtained, contributed by each policy remaining in force for ten or more years may be applied to lessen mortuary premiums or withdrawn in cash."

The mortuary premiums were paid as called for by the Society for a period of twelve years. In the twelfth year this suit was brought by the administrator of the assured, Amanda C. Marshall, deceased, to recover 25 per cent. of these mortuary premiums.

The case was submitted to the court for trial. It was stipulated, among other things, that between August 7, 1885, and May 7, 1897, the Society had received the payments shown in the bill of particulars filed in the cause, aggregating \$2,615.80; of which amount the sum of \$180 is the expense fund, and the sum of \$2,435 is mortuary pre-

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miums; and that during the time covered by these payments said policy was in full force and effect.

The court found for the plaintiff below, and entered a judgment for 25 per cent. of such mortuary premiums with interest thereon, amounting to \$815; and thereupon this appeal was perfected.

MORAN, MAYER & MEYER, for appellant.

HELMER, MOULTON & WHITMAN, for appellees.

MR. JUSTICE BALL delivered the opinion of the court.

The right of action is in the plaintiff below. The policy names Amanda C. Marshall as the *assured* and her husband, Henry V. Marshall, as the *insured*. The agreement is with her and the promise is to pay to her. She having died, this right of action passed to her administrator.

As we read this policy, the Society agreed that it would call each quarter for a mortuary premium not greater than is named in the schedule on the back of the policy; that when received, 75 per cent. of each premium should be deposited in trust in bank and should constitute the death fund, to be used solely in settlement of death claims; that the remaining 25 per cent. thereof should "be deposited with the Farmers Loan & Trust Company of New York or invested in securities authorized by law, for investments in trust companies, for the guaranty fund additional to the capital, and as a further protection to policy-holders"; and that the full share of this surplus contributed by each policy remaining in force for ten or more years might be applied to lessen the mortuary premiums or be withdrawn in cash by the assured.

The admission of appellant that from 1885 to 1897, as called for, there were paid to it mortuary premiums amounting to \$2,435.80 under the terms and conditions of this policy, puts upon it the burden of showing that either directly or indirectly it applied this 25 per cent. of the mortuary fund to the payment of death losses, and this with the

knowledge of the assured, her legal representatives or assigns or of the insured, Henry V. Marshall.

The wording of the policy is that of the Society. It is elementary that all doubtful readings in such a contract are to be construed against the party drawing it. The provision of the policy that "the full share of the surplus thus obtained * * * may be applied to lessen mortuary premiums or be withdrawn in cash," does not give the Society the right to apply such surplus or any part of it, in diminution of the mortuary premiums without the consent of the other parties to the contract.

In the same category is the provision that "the mortuary premiums * * * will be diminished by the surplus portion of the preceding premium not appropriated by reason of actual claims by death." In our opinion this provision relates to 75 per cent. of each mortuary premium which is specifically set apart to be used solely in settlement of death claims.

It is contended that the quarterly receipts given by the Society upon payment of the mortuary premiums by the use of the words "less return premium," or "less rebate or dividend," gave notice to the insured and to the assured that the 25 per cent. specifically set apart "for the guaranty fund additional to the capital and as a further protection to policy-holders," was being drawn upon to pay death losses; and that therefore, even if the contract as to the right to make such application was of doubtful construction, the Society gave it that construction for ten years, and the plaintiff below having acquiesced in that construction for that length of time, is bound thereby.

The defect in this argument is that neither phrase states definitely, nor even by fair inference, that this 25 per cent. so specifically set aside was being drawn upon to pay death losses. Indeed the fair reading of these phrases is that they refer to a surplus arising out of the 75 per cent. theretofore paid in constituting the death fund, and that this is the surplus that is being applied to diminish the coming mortuary premium.

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The receipt by the insured of the letter and check for \$87.90/100 in August, 1895, "in payment of decennial dividend" on this policy does not bind appellee, for the reason that neither the letter nor the check refers in any way to this guaranty fund.

Without going into the record in detail at this time it is sufficient to say that in it we find no such clear evidence that any part of this guaranty fund was paid out upon death losses chargeable under this policy; or, if it was, that either the insured or the assured had any reasonable or legal notice of this fact.

The contract in question called upon the Society to retain this guaranty fund subject to the disposal of the assured at the end of ten years from its date. There is nothing in this record showing any change in the contract. It follows that the finding of the learned trial Judge is correct, and therefore the judgment of the Circuit Court is affirmed.

Affirmed.

Park Steel Company v. Staver Carriage Company.

Gen. No. 12,080.

1. **VENDOR**—*when not bound to make delivery.* A contract which provides for the sale, delivery and acceptance of a minimum number of tires and likewise for the sale and delivery of a maximum number of tires, does not require the vendor to deliver such maximum number where the delivery thereof is conditioned upon their being used prior to a given date in the business of the vendee, if it appears that such maximum number was not required in the business of the vendee prior to such time, and the refusal of an entire order is proper notwithstanding part of the same might have been required in the business of the vendee.

2. **GENERAL ISSUE**—*effect of withdrawal of.* The effect of withdrawing the general issue in an action of assumpsit is to admit the plaintiff's claim subject to the plea or pleas remaining on file and unwithdrawn.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in

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this court at the October term, 1904. Reversed and judgment here. Opinion filed October 16, 1905.

Statement by the Court. Appellant brought suit in assumpsit against appellee to recover an alleged balance of \$465.30 due for tire steel sold and delivered by the former to the latter in the year 1899. Appellee filed a plea of the general issue. It also filed a plea of set-off, in which it was alleged that appellant was indebted to appellee in the sum of \$2,019 damages suffered by appellee in consequence of the failure and refusal of appellant to perform a certain contract in writing entered into August 4, 1898, between appellee and Park Brother & Co., Limited, in words and figures following:

“Pittsburg, Pa., August 4, 1898.

Memorandum of sale made by Park Brother & Co., Limited.

To Staver Carriage Co. of Chicago, Ill., all the tire steel of good and suitable quality which will be used in buyer's works prior to September 1, 1899, not to exceed 14,000 sets nor to be less than 10,000 sets at the following prices and terms:

Round edge tire steel,
3/4 x 3/16 and heavier.
\$1.15.

Terms: Cash fifteen days
from date of each invoice,
less 2 discount.

Deliveries F. O. B. Pittsburg, less carload rate of freight to Auburn Park, Ill.

No freight allowed on shipments of less than 300 pounds.

To be specified: for carload shipments and in reasonable time for seller to make required deliveries, but all not later than fifteen days before the expiration of this contract;
* * *

That March 1, 1899, this contract was duly assigned by said Park Brother & Co., Limited, to appellant and the latter assumed and agreed to perform the same; that since appellant so assumed the performance of said contract, it has only partially performed the same and has failed and refused to perform the same in this, that July 6, 1899, within

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a reasonable time to enable appellant to ship the same and more than fifteen days prior to the expiration of said contract, appellee ordered from and specified to appellant, in accordance with the terms of said contract, 134,600 pounds of tire steel, part and parcel of the steel mentioned in said contract; that all of said steel so ordered and specified was necessary for use in the works of appellee prior to September 1, 1899, in the conduct of its business; that appellant failed and refused to ship and deliver to appellee the steel so ordered and specified as aforesaid, although this amount, together with the amount previously furnished on said contract, did not exceed 14,000 sets, and although appellee up to that time had faithfully performed its part of said contract and was there ready, able and willing to perform the balance of said contract on its part; whereby appellee was damaged to the amount of \$2,019, etc.

Upon the trial appellee withdrew the plea of the general issue, and elected to stand on its plea of set-off. The trial resulted in a verdict against appellant in the sum of \$1,234.70. From the judgment entered upon this verdict the present appeal was perfected.

MUSGRAVE, VROMAN & LEE, for appellant.

BULKLEY, GRAY & MORE, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

It appears from the evidence that during the life of the contract the price of steel tires advanced so as to justify the amount of the verdict, if appellee is entitled to any recovery in this action. It also appears that between the date of the contract and August 5, 1899, appellant had delivered to appellee, on its orders and specifications, 10,600 sets of tires, the last delivery being August 5, 1899, on appellee's order and specification dated June 7, 1899. July 6, 1899, appellee ordered and specified 3,400 other sets of tires, which with those already ordered and delivered made 14,000 sets, the maximum number provided for in the contract. Appellant, under date of July 12, 1899, answered, stating that it

had applied 496 sets of previous order on the *quota* for the month of July, and would therefore accept sufficient of the order to complete the *quota* for the month of July, viz: 581 sets, and would bill the remainder at the then market price. July 13, 1899, appellee replied that this plan was not satisfactory, and demanded that the 3,400 sets be shipped to it before the end of the contract. Four days later appellant wrote stating that it could not furnish the whole number "as your contract calls for what you will actually use and does not contemplate carrying over a single set on the first of September, and from our knowledge of your consumption we are satisfied that you could not use the balance up to the maximum from this time on"; and said it would wait further advices as to how many sets appellee could actually consume until that date in excess of previous orders. Appellee's president and Wilson N. Abbott, its superintendent, admitted that had the full amount of the 14,000 sets been delivered to them, from 1,500 to 2,000 sets would have been carried over the first of September, 1899.

Under the contract appellee was bound to order from appellant and to receive from it at least 10,000 sets of tires prior to September 1, 1899; and no matter what might be its needs, it could not compel appellant during the same period to deliver to it more than 14,000 sets. Between this maximum and this minimum the number of sets which appellee had the right to demand from appellant is fixed and determined by the words, "which will be used in buyer's works prior to September 1st, 1899." These are plain words, and the court in construing the contract must give them their obvious and every day meaning. Thus read, they limit the sets of tires which appellant must furnish over and above 10,000 sets and within the maximum of 14,000 sets to the actual need of the business of appellee prior to September 1, 1899. That appellee so understood the contract is shown by the allegation in the plea of set-off, "that all and every of which said tire steel" (referring to the order for 3400 sets) "so ordered and specified was necessary for use in its" (appellee's) "works prior to September 1, 1899, in the con-

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duct of its business, and would have been so used." As we have seen, this material allegation was affirmatively disproved by the president and by the superintendent of appellee.

This contract was interpreted by the Circuit Court of Appeals of the United States in *Staver Carriage Co. v. Park Steel Co.*, 104 Fed., 200, in an action of assumpsit brought by appellee against appellant, based upon the non-performance of the contract. The declaration did not allege that the tire steel called for by this last order was needed to be used in appellee's works prior to September 1, 1899. A special demurrer, which pointed out this defect, was sustained in the Circuit Court, and that ruling was affirmed by the Court of Appeals. The opinion is instructive in its reasoning and is supported by the citation of many authorities. See, also, *Manhattan Oil Co. v. Richardson*, 113 Fed., 923; *H. W. Williams Cooperage Co. v. Scofield*, 115 Fed., 119; *Allen B. Wrisley Co. v. Mathieson Alkali Works*, 107 Ill. App., 379; and *Cameron v. Sexton*, 110 Ill. App., 381.

The plaintiff below tendered its instruction No. 3 to the court and requested that it be given to the jury as tendered. It reads:

"3. Under the terms of the contract the plaintiff is not legally obliged to deliver any more tire above the minimum quantity of ten thousand sets, than the defendant will use in its works prior to the first day of September, 1899, and is not required to deliver tire that will be held by the defendant after that date to be used by it in its works after that date."

The court, of its own motion, added the following to this instruction and gave it to the jury as thus modified, over the objection and exception of appellant: "except that if you believe from the evidence that the defendant ordinarily in the reasonable prosecution of its business carried in its bins for continuous use, then in addition to those that would be otherwise used by defendant in its works prior to September 1st, 1899, the plaintiff would be required to deliver enough to enable defendant to maintain such quantity in

its bins, but in no event must plaintiff deliver more than fourteen thousand sets in all."

The 5th and 7th instructions tendered by appellant, each of which referred to the quantity of tire appellee could reasonably use in its works prior to September 1, 1899, were severally added to by the court to conform to the modification stated in instruction No. 3.

It will be seen that the modification omits some phrase necessary to make it understandable; but waiving the effect of this defect, and reading it as referring to a certain number of sets of steel tire which appellee in the ordinary prosecution of its business carried in its bins for continuous use, it is evident that it is in conflict with the interpretation of the contract as we understand it.

It is the established law that if an order for a large number of like articles as given is in part clearly beyond or outside of the contract under which the parties are dealing, the seller is under no duty to separate the necessary from the unnecessary number, but may safely refuse the whole order. This case was tried upon a wrong theory of the law. Under the facts appellee cannot hold a recovery based upon its plea of set-off. By the withdrawal of the general issue, and proceeding to trial on that plea, the claim of appellant for the sum of \$465.30 was admitted to be justly due and owing from appellee to appellant. We therefore reverse the judgment of the court below and enter judgment here against appellee and in favor of appellant for the sum of \$465.30, with interest at 5 per cent. per annum from December 22, 1903, to the date of the filing of this opinion, amounting to the sum of \$507.50, and costs.

Reversed and judgment here.

Louis J. Hanchett v. Ernest Haas.**Gen. No. 12,044.**

1. INSTRUCTIONS—*when refusal of proper, will not reverse.* The refusal of proper instructions will not reverse where it appears that substantial justice between the parties has been done.

2. INSTRUCTIONS—*when, upon credibility of witnesses, proper.* The phrases "wilfully and corruptly testifying falsely" and "wilfully or corruptly testifying falsely," used in an instruction upon the question of the credibility of witnesses are identical and the use of either of them is proper.

3. NEGLIGENCE—*what incompetent upon question of.* It is not proper to permit one who has been accused of negligence in handling his vehicle to testify that he was an expert driver of horses and had never before been accused of negligence.

4. JURY—*what may take upon retirement.* The jury may upon their retirement be permitted to take with them the amended declaration filed in the cause.

5. VERDICT—*when not disturbed as excessive.* Merely because the trial judge suggested to appellant's counsel that if he would agree to pay a specified sum he, the judge, would compel a *remittitur* of a particular amount, does not require that the Appellate Court should reverse the judgment as excessive. It must appear from the record that such judgment is excessive to justify a reversal upon that ground.

6. VERDICT—*when not excessive.* A verdict of \$2,000 held not excessive under the particular evidence in this case, in an action instituted for the benefit of a minor of the age of about 14 years.

7. INJURY—*what competent upon question of.* The testimony of a physician upon the condition in which he found the plaintiff several months after the accident in question may be competent in connection with other testimony in the cause.

8. HYPOTHETICAL QUESTION—*when form of, proper.* It is proper to inquire as to the opinion of an expert formed on an assumption that the testimony of a single witness which he has heard in its entirety during the trial is truthful.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed October 16, 1905.

ALDEN, LATHAM & YOUNG, for appellant.

THEODORE G. CASE and JOHN T. MURRAY, for appellee;
A. W. BROWNE, of counsel.

MR. JUSTICE BROWN delivered the opinion of the court.

Appellee (the plaintiff below) recovered judgment against the appellant (the defendant below) on the verdict of a jury for \$2,000. From this judgment the defendant appealed to this court, and alleges and argues here that the judgment was excessive and contrary to the evidence, that the court below erred in the admission and exclusion of evidence, and that it erred in allowing the declaration in the cause to be taken into the jury room.

It appears by the bill of exceptions that in a colloquy between the counsel for the respective parties and the court, after the motion for a new trial had been argued, the trial judge remarked that he thought the verdict was too large, but that he did not want to set it aside. Further suggestions from each side were made, and the judge said to the defendant's counsel, "If you will pay \$1,500 and not appeal the case, I will compel a *remittitur* of \$500; otherwise I will overrule the motion for a new trial." The defendant not agreeing to pay \$1,500 without appealing, the court then denied the new trial.

A point made by the appellant in his briefs is that "it was error for the trial court to require the appellant to agree not to appeal the case as a condition precedent to compelling a *remittitur*. * * * The trial court * * * should have compelled the *remittitur* absolutely or sustained appellant's motion for a new trial."

Assuming that the course they indicated was the only proper one for the trial judge to have pursued if he believed the verdict excessive, we see nothing more for us to review in his action than is presented in the first point of appellant's argument; that is, that a new trial should have been granted because the verdict was excessive.

It undoubtedly is true, as this court said in Chicago and

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North Western Ry. Co. v. Kane, 70 Ill. App., 676, that the trial judge is generally in far better position than an appellate court to pass upon the question of the amount of damages, and it may be that the assertion of the trial judge, preserved in the record, that he viewed the verdict as excessive, should have weight to confirm an opinion of this court to the same effect, formed from the evidence, as it seems to have done in West Chicago Street Railway Co. v. Wheeler, 73 Ill. App., 368; but if the duty of the trial judge, definitely and unconditionally to pass on the alleged excessiveness of the damages, is not performed, we not only "prefer," but feel obliged, as we did in C. & N. W. Ry. Co. v. Kane, "to decide the point on the evidence in the record" and not on "the statements of the trial judge."

The action was for personal injuries received by the plaintiff, as it was alleged, by the defendant negligently driving a buggy into him and knocking him over. The defendant denied any negligence on his part, and seems to have insisted that the plaintiff, being a foot passenger on the street on his way from one street car to a connecting one, negligently ran into the buggy while it was standing still. There was, however, evidence offered on behalf of the plaintiff amply sufficient, if believed as against the conflicting testimony, to establish the following state of facts: That the plaintiff, a boy about fourteen years old, alighted at the corner of Indiana avenue from a street car going west on 43rd street in Chicago, at about six o'clock in the evening of April 3, 1900; that he was a delivery boy in the employ of a shoe house, and was then carrying two or three packages of shoes; that he walked northwesterly towards the sidewalk at the northeast corner of the two streets, intending to take the car coming north on Indiana avenue; that he was struck by a horse attached to a buggy, which was being driven by the defendant at a high rate of speed eastward on 43rd street; that the collision was between the breast of the horse and the head of the boy; that the blow knocked him down and inflicted upon him serious injuries.

Counsel for appellant say that the preponderance of the

evidence showed both that appellant was not guilty of negligence, and that the defendant was so guilty, and that either proposition is fatal to appellee's case. We do not think, however, that there was any such clear preponderance of evidence against the testimony we have outlined, as to warrant us in disturbing the verdict of the jury. A conflict of testimony there undoubtedly was, but it was for the jury to pass on the credibility of the witnesses and the suggestion that the street car men were interested in fixing a liability for the accident on defendant, lacks sufficient force to justify us in declaring that the jury ought to have paid no attention to their sworn statements.

Nor do we find anything to require a reversal of this judgment in the instructions given that are complained of, nor in the refusal to give those at the request of appellant which were rejected.

We still regard the language in the third instruction "obnoxious to criticism," as we said in *O'Donnell, Adm'r v. The Armour Curled Hair Works*, 111 App., 516, but in that case we simply declined to reverse a judgment because the instruction had been refused, and quoted, moreover, the language of the Supreme Court, that although the court might have refused proper instructions, yet if the record showed that substantial justice had been done, a verdict ought not to be disturbed. Since then the Supreme Court has refused to reverse a judgment on account of this instruction, and has expressly declared that it was substantially correct and had been approved by that court. *Chicago City Ry. Co. v. Bundy*, 210 Ill., 48.

To instruction ten we see no objection. Its doctrine has been approved in *Chicago City Railway Co. v. Allen*, 169 Ill., 290; *North Chicago Street R. R. Co. v. Fitzgibbons*, 79 Ill. App., 636; *Perkins v. Knisely*, 204 Ill., 277.

The distinction between "wilfully and corruptly testifying falsely" and "wilfully or corruptly testifying falsely" is difficult to make. If one commits wilful perjury, he necessarily must do it corruptly.

Nor do we see any valid objection to instructions six and

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twelve. Instructions IX, X and XII, which were refused, were sufficiently covered by those that were given, and the propriety of giving III and IV would have been at least doubtful for various reasons. We do not think that the jury were left without sufficient instruction concerning the necessity of proof of the defendant's negligence and the freedom of plaintiff from negligence contributing to the accident.

Appellant complains that he was refused permission to testify that he was an expert driver of horses, and had never before been accused of negligence in driving injurious to any body. The ruling of the trial judge that this testimony was immaterial, can hardly be seriously urged as erroneous.

It is also claimed that it was error to allow the amended declaration to be taken by the jury into the jury room. The Supreme Court has said that it is the general practice to allow the jury to take the pleadings into the jury room when requested by either party, and that there is no objection to it. *City of East Dubuque v. Burhyte*, 173 Ill., 556.

There is left for discussion only the point, which is strenuously insisted on by appellant, that the damages are excessive, and in connection therewith the claim that improper testimony was admitted from the medical experts called by the plaintiff. We will consider them together.

As before noted, an opinion of the trial judge, on which he refused to act, cannot properly help us in answering the questions involved in these objections of appellant to the judgment. We must consider the evidence submitted to the jury on which they, judging of its force and credibility, acted.

The plaintiff himself testified that after he was knocked down he was helped to the sidewalk and found that one of his teeth was knocked out, that he took an Indiana avenue car going north at 43d street, changed to a 35th street car, went west to Lowe avenue and from the corner of Lowe avenue and 35th street walked to his home at the corner of Lowe avenue and 33rd street, and went immediately to bed. Other testimony concerning the immediate effect of the accident was that the boy when assisted to his feet was bleed-

ing at the mouth, that he was crying and holding his head down, and had one tooth in his hand. From this and from testimony that appellee then told appellant that he was not hurt except in losing a tooth, and that no physician was called to attend his alleged injuries while he was laid up at home from them, counsel for appellant argue that the only damage sustained by the appellee was the loss of a tooth, and that the verdict is excessive. But this evidence so relied on is not all that appears in the record. It appears from the testimony of the plaintiff himself that when he got home his mouth was sore and his teeth loose, that he felt weak, and that his right side pained him, and by the next day the small of his back also; that he was laid up at home three or four weeks—how much of the time in bed he does not remember. He also swears that when he went back to work after three or four weeks, he did not feel as well as he did before he was hurt, and has had frequent pains in his back and side following any unusual exertion, although he never had such pains before the accident. He testified that following the accident and the blow on his mouth, he was obliged to have four back teeth taken out because of the pain incident to the disturbance of the fillings.

The mother of the boy testified that when he came home he was very pale and his mouth was swollen and his side blue; that she put him to bed, where he stayed for a week; that for four weeks he was at home, and she treated his back with liniments every day; that he was a sound, healthy boy before the accident, and had no drooping of the shoulders; that since the accident he has been frequently sick and had not been in good health, losing time from his work in consequence.

His father testified that before this accident there was no droop in the boy's shoulder and nothing the matter with it, but that now there is such a droop, and that he was in poor health from the accident in April until November, 1903; that during that period he could work but a part of the time; that in November he was very ill and a Dr. Guillaume was

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called in and treated him, but that he remained ill and confined to his house for months.

Then Dr. Guillaume testified that when he examined the boy at the request of his father, several months after the accident, he found a curvature of the spine, a wasting of the muscles, and a drooping of the shoulder, and that "assuming that a boy was run down by a horse on the ground, that after he got home a few minutes afterward, he had a pain in his side and found that he was badly hurt in the mouth, and the next day discovered that he had a pain in the small of his back," he should attribute such a condition as was disclosed by his examination of the plaintiff to the injuries received.

Another physician of experience—introduced as a medical expert by the plaintiff—Dr. Stuart Johnstone—testified that a year and a half after the accident he examined the plaintiff at the request of his counsel, and found that he had lost an upper right incisor tooth, that he drooped in the right shoulder, an inch and a half lower on the right shoulder than the corresponding shoulder; that he had a curvature of the spine and that his muscular development on the right chest and back was less than on the corresponding side. He further testified that he had heard the plaintiff's entire testimony in this cause, and that assuming it to be true, he attributed the condition in which he found him to the injury sustained as described by him, and that the condition was a permanent one.

There is in this testimony, if it was properly admitted and was believed by the jury, quite enough to justify a verdict for \$2,000. Although the trial judge, on the motion for a new trial, expressed his disbelief in the doctor's testimony, and said that he thought the boy had always been delicate and sickly, there is no evidence in the record to this effect, and none was offered. We agree with the learned judge that the question of credibility was "for the jury to determine."

The only question remaining, therefore, is whether the evidence above detailed was properly admitted. Appellant

insists that the physicians should not have been allowed to testify as to the condition they found the plaintiff in so long after the accident. We do not think the court was in error in admitting this evidence. By itself it proved nothing, but in connection with the testimony of the plaintiff and of his father and mother, and with the expert testimony of the same doctors as to their opinion of its cause, it was both competent and material to the issues raised by the pleadings. *Ill. Steel Co. v. Delac*, 201 Ill., 150; *West Chicago St. Ry. Co. v. Dougherty*, 209 Ill., 244; *Gifford v. People*, 148 Ill., 173.

Nor do we think the hypothetical questions put to these physicians as experts were inadmissible or improper.

The opinion in *L. N. A. & C. Ry. Co. v. Shires*, 108 Ill., 617, cited by appellant, does not lay down any rule under which they could be so held. The question to an expert which in that case was held properly excluded, was one which the court said "did not call for his opinion on the testimony of Dr. Tillotson" (another witness), as given on the trial, but on "statements as well made" (by Dr. Tillotson to him) "on the previous day." Of course the court held that a medical expert had no right to testify to an opinion formed upon information derived from private conversations with a witness. But to inquire of an expert his opinion, formed on an assumption that the testimony of a single witness, which he has heard in its entirety during the trial, is truthful, is allowable. *Wright v. Hardy*, 22 Wis., 334; *Rogers on Expert Testimony*, sec. 28.

We do not think that there was any error in the admission of those parts of the testimony of the father and mother of the plaintiff which are complained of. The statement of the father as to "curvature of the spine" was stricken out on the motion of the defendant.

We do not agree with counsel for appellant, that the remarks of counsel for the appellee in their briefs, concerning the argument of appellant in relation to the amount of damages, is tantamount to an admission that \$2,000 is an excessive verdict, and giving due consideration to the action of the jury and to their evident decision on the credibility

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and weight of the testimony, we see no justification for interfering with that verdict.

The judgment of the Superior Court is affirmed.

Affirmed.

J. G. McCarthy v. Alphons Custodis Chimney Construction Company.

Gen. No. 12,082.

1. FOREIGN CORPORATION—*when failure to comply with act of May 26, 1897, cannot be relied upon.* In an action upon an appeal bond, the non-compliance of a foreign corporation (plaintiff) prior to having obtained the judgment upon which the bond was given, is not a defense.

2. FOREIGN CORPORATION—*what not, to "transact business" within meaning of act of May 26, 1897.* To take an appeal bond from a judgment obtained by it, is not to "transact business" within the meaning of the act of May 26, 1897.

3. FOREIGN CORPORATION—*when may maintain action in this State.* If a foreign corporation has complied with the act of May 26, 1897, at the time of bringing suit, its status is established and it is entitled to maintain the same.

4. APPEAL BOND—*obligors on, estopped to deny judgment recited therein.* The obligors on an appeal bond are estopped to deny the validity of the judgment recited therein.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the October term, 1904. Affirmed with damages. Opinion filed October 16, 1905.

JOHN E. DALTON and JOHN S. STEVENS, for appellant.

ZEISLER, FARSON & FRIEDMAN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The appellant in this case is a surety on an appeal bond of \$6,500 given by L. L. Leach & Son, a corporation, to the appellee, conditioned to pay the amount of a judgment against said L. L. Leach & Son for \$4,258.25 and costs (rendered in favor of the appellee in the Superior Court of Cook county

in February, 1902) in case said judgment should be affirmed in the Appellate Court. The judgment was duly affirmed in this court, (110 Ill. App., 338) but was not paid. Thereupon the appellee sued the appellant on the appeal bond in the Superior Court. The appellant filed three pleas, to the effect that the appellee was a foreign corporation, and that before and at the time of the execution of the appeal bond it had been transacting business in Illinois, but had not filed in the office of the Secretary of State of Illinois a copy of its charter, or articles or certificate of incorporation, nor received from the Secretary of State any certificate authorizing it to do business in Illinois; and that the appeal bond sued on "arose out of" business transacted by the appellee with L. L. Leach & Son during the time it was not authorized or permitted by statute, by reason of such default, to maintain any action in the Superior Court; wherefore the judgment and the bond were wholly void.

A general demurrer was sustained by the Superior Court to these pleas, and the appellant elected to stand by them. Judgment was therefore rendered against him in favor of the appellee for \$6,500 debt and the damages assessed at \$4,706.25. From this judgment the appellant appealed to this court and has assigned here for error the sustaining of the demurrer to the pleas.

The demurrer was plainly properly sustained. The contention of the appellant seems to be based on the assumption that the judgment for the payment of which the bond was given is void because of the facts set forth in the pleas. This is not true. If when a foreign corporation sues in this State it has not complied with the Act of 1897 as amended, it is a matter of defense in that suit, which must be in some way called to the attention of the court to defeat a judgment. If such a suit goes to judgment without the question being raised in the lower court, the judgment cannot be questioned in an appellate court because of the absence of such compliance, even in an appeal taken in the same case. *Holmes v. Standard Oil Co.*, 183 Ill., 70. This is plainly consistent with right reason as well as authority. Any other rule would

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be absurd. Even more absurd would it be to hold that an appeal bond reciting such a judgment should be held void as without consideration, or as on an illegal consideration because of a showing made in the suit on the bond that the original judgment was erroneously given on account of such non-compliance with the statute by the plaintiff. Either the question had been raised and disposed of by the court adversely to the defendant—in which case such disposition was certainly conclusive in a collateral matter, and the judgment secure against any collateral attack—or it was not raised, and therefore could not be thereafter raised either directly or collaterally.

Nor is this all. The obligors in an appeal bond are in any event estopped to deny the validity of the judgment recited in it. *Smith v. Whitaker*, 11 Ill., 417; *George v. Bischoff*, 68 Ill., 236; *Meserve v. Clark*, 115 Ill., 582; *Harding v. Kuessner*, 172 Ill., 125. It therefore would have made no difference even had the judgment been void. Its existence and validity could not even then have been questioned by the appellant in this action.

If the contention of the appellant should be considered to rest on the proposition that the act of taking an appeal bond was "doing business" in the State and therefore an illegal act, because at that time no certificate had been filed, and that in consequence no action could arise based on it, it would be equally untenable. First, it is entirely clear that to take such a bond is not to "transact business" within the meaning of the statute; and, secondly, it is the status of the corporation at the time that it brings the suit on a demand or tort, that determines its right to maintain the suit. This is the plain meaning of the statute, and so the Supreme Court construes it in *Thompson Co. v. Whitehed*, 185 Ill., 454.

The court is of the opinion that the inference is warranted from the record that this appeal was prosecuted for delay, and therefore affirms the judgment, with additional damages of \$212.91 (being 5 per cent. of the damages assessed below) in addition to the costs.

Affirmed with damages.

Orson Smith v. George Berz, Coroner, etc.

Gen. No. 12,081.

1. **FOREIGN RECEIVER OR ASSIGNEE**—*rights of, to property in Illinois.* A foreign receiver, or a foreign assignee whose office and power are statutory, and to whom no voluntary conveyance has been made, cannot effectively convey real estate in Illinois, nor can he obtain the assistance of the courts of Illinois to secure the possession of chattels in this jurisdiction. If he has given no notice of his claim to debtors of the estate residing in Illinois, before a garnishment is made, he cannot defeat such garnishment by attaching creditors, either resident or non-resident, of Illinois. But if without the aid of the Illinois courts he has taken actual possession of chattels in Illinois, or has notified debtors of the estate residing in Illinois of his claim, before an attachment is made, his claim (if it results from laws or proceedings not contrary to the public policy of Illinois) will be recognized and protected against such attachment unless the attachment is by a citizen of Illinois. As distinguished from a receiver or assignee purely statutory and appointed *in invitum*, a foreign voluntary assignee, for the benefit of creditors, may have, in proper cases, the aid of Illinois courts to secure possession and control of property in Illinois conveyed to him, and, as against foreign attaching creditors, he will be protected in his right to all the property in Illinois of which he does obtain possession. But neither a voluntary assignee, nor one purely statutory, from a foreign jurisdiction, nor a receiver appointed by a foreign court, can successfully hold property of which he has not obtained possession in the jurisdiction appointing him, against attaching creditors of the insolvent estate who are citizens of Illinois.

2. **CROSS-ERRORS**—*effect given to, where assignments of, are sustained.* Where cross-errors are assigned to the admission of evidence the Appellate Court will not, if it holds such evidence incompetent, treat such evidence as though not in the record and affirm a judgment otherwise to be reversed, but will give effect to the sustaining of such cross-errors by instructions to the trial court.

3. **ATTACHMENT NOTICE**—*effect of.* An attachment notice mailed in due course with proper address raises a *prima facie* presumption of reception.

4. **ATTACHMENT PROCEEDING**—*burden of establishing fraudulent*

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character of. Where the replevin of goods is sought to be justified by virtue of attachment proceedings, the burden of establishing that the same were fraudulent in character, is upon the party asserting such claim.

Action of debt upon replevin bond. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed October 16, 1905. Rehearing denied October 30, 1905.

Statement by the Court. This is an appeal from a judgment of the Circuit Court of Cook county for damages of \$2,000 on a replevin bond. The judgment was rendered in July, 1904, against the appellant, Orson Smith, who was surety on the bond and was alone served with process, the principal, one Francis Lettellier, although sued with appellant, not having been found in the jurisdiction. The bond of Lettellier as principal and Smith as surety was given to the appellee as coroner in October, 1897, on the institution of a suit in replevin by said Lettellier in the Circuit Court of Cook county against the sheriff of Cook county for certain property in said bond described and was for the penal sum of \$2,000. The coroner executed the replevin writ and delivered the property to Lettellier. The replevin suit was dismissed without a trial on the merits in December, 1899, for failure of Lettellier to prosecute and a *retorno habendo* ordered. The property not having been returned, suit was brought on the replevin bond by the coroner for the use of the sheriff, who held the goods when replevied.

To the declaration in ordinary form for replevin the defendant Smith first pleaded *non est factum* and secondly that the plaintiff should recover but nominal damages because the goods taken were the property of Lettellier, the replevinor, and that the replevin suit was dismissed without a hearing on the merits.

The plaintiff joined issue on the first plea and to the second replied double, in the first replication traversing and in the second alleging that on October 4, 1897, the Gilliam Manufacturing Company, a West Virginia corporation, sued

out an attachment writ for \$1,605.24 against the Hamilton Kenwood Cycle Co. in the Circuit Court of Cook county, directing the sheriff of Cook county to attach the property of the Hamilton Kenwood Cycle Co. to satisfy the writ, and that it was in pursuance thereof that the property in question was taken, and averring that the property so taken was the property of the Hamilton Kenwood Cycle Co. and was subject to said writ of attachment. A rejoinder traversing all the allegations of the second replication was filed by the plaintiff.

Later two additional pleas were filed by the defendant. The first of these additional pleas sets out a resolution of the Hamilton Kenwood Cycle Company on June 17, 1897, authorizing the execution of a certain chattel mortgage to one J. Frederick Baars, trustee, under certain specified trusts, the net purport of which was that he should, out of the proceeds of the property covered by the mortgage, pay the creditors of the Cycle Company in an arrangement of priority according to several classes: first, the National Bank of Grand Rapids and four other creditors; second, twenty-three enumerated creditors; third, nine other creditors, among them the Gilliam Manufacturing Co. Said mortgage purported to cover all the personal property of the Cycle Company, and specified with other things "all goods, bicycles and materials for the same in transit, and all goods and bicycles sent out on commission or otherwise wheresoever the same may be; also all additions to the personal property mentioned which may be made from time to time by the said first party during the life of the mortgage and all articles procured to replace any of said property and said goods." The plea sets out the chattel mortgage in full and avers that it was duly executed on June 17, 1897, by the Cycle Company through its treasurer and general manager; that said Baars accepted the trust and that the mortgage and acceptance were in accordance with the statutes of Michigan filed with the city clerk of the city of Grand Rapids, Michigan, where the company had its principal office and its residence. It also avers that on or about June 21, 1897, the trustee took

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actual possession of all property of the Cycle Company covered by said chattel mortgage in the State of Michigan and employed Jones & Jennings, agents of the Cycle Company in Chicago, Illinois, to hold possession of the property in Chicago for the trustee and to account to him therefor; that soon after the trustee had shipped from Chicago to himself at Grand Rapids nearly all the property then in Chicago and that none of the property levied on by the sheriff under the attachment issued October 4, 1897, at the suit of the Gilliam Manufacturing Company against the Cycle Company was in Chicago on June 19, 1897, but was either then in Grand Rapids or was manufactured after that date out of material then in hand at Grand Rapids; that the attachment was levied upon goods subject to the mortgage and taken possession of by the trustee at Grand Rapids and sent by him afterwards from Grand Rapids to Chicago to be sold in that market; that the safe levied on was purchased by the trustee after the mortgage was given; that on August 18, 1897, the trustee filed a bill in chancery in the Circuit Court of Kent county at Grand Rapids, Michigan, to foreclose the chattel mortgage and for the appointment of a receiver to take charge of the property; that thereupon Thomas J. O'Brien was by the court appointed receiver, and authorized to sell the property at public or private sale; that the said receiver then took immediate possession of said property and shipped from time to time a considerable part of it to Chicago for sale, and that some of this property so shipped was levied on by the attachment writ of the Gilliam Manufacturing Co.; that on September 8, 1897, a final decree in the foreclosure suit was entered directing the receiver to sell the property remaining unsold at public sale; that on September 10, 1897, the receiver published in the daily newspapers of Grand Rapids notice of a public sale to take place on September 18, 1897, and posted notices thereof and sent by mail, postage prepaid, notice to all creditors of the Cycle Co., including the Gilliam Manufacturing Company; that on September 18, 1897, the property was sold by the receiver pursuant to the notice and was bid off by Letellier for \$15,000; that

on September 20, 1897, the sale was confirmed by the court; that on September 21, 1897, the agents in Chicago were notified of the sale to Lettellier and were employed by Lettellier as his agents, and thereafter accounted and reported to Lettellier as owner for all sales made; that afterwards all sales and transactions had in relation to the property were by Lettellier as purchaser, owner, and possessor of said property.

As a conclusion, the plea avers that the title of Lettellier was paramount to that of the Gilliam Manufacturing Company, a West Virginia corporation, and that the said Gilliam Company had no title to said property nor any right of possession thereto nor acquired any by the levy of its writ of attachment on October 4, 1897.

The second of the additional pleas sets up the same matter as the first, and stated as its conclusion that by virtue of the purchase at the receiver's sale, Lettellier became invested with and succeeded to all the right, title and interest of the trustee, under the laws of Michigan, and that his lien was paramount to the one obtained by the Gilliam Manufacturing Company by its levy.

To these additional pleas the plaintiff filed replications traversing each statement of the pleas and concluding to the country, and also replications alleging that even if the safe was as alleged purchased by the trustee, the possession of it was, when taken by the attachment, in the Cycle Company and that it was subject to said attachment, that even if the allegations of said pleas were true, yet nevertheless when the said attachment writ was levied the said goods and chattels were in the apparent and ostensible possession of the Cycle Company, and that said company was then to all appearances and ostensibly conducting and carrying on the sale of said goods and chattels in Chicago in its own name, that the plaintiff had no notice to the contrary before taking said goods and chattels and that said property was subject to said attachment.

Further replications averred that even if the allegations of the pleas were true, yet the authorization, execution and

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recording of the chattel mortgage, together with the foreclosure and the sale of the property thereunder, were executed and carried out without consideration between the parties thereto and with the fraudulent intent of hindering the plaintiff in the collection of its debt against the Cycle Company and were fraudulent and void against the plaintiff, and that Lettellier had notice thereof, wherefore the goods levied on were as against the plaintiff at the time when so taken the property of the Cycle Company and subject to attachment against it.

The defendant in the action filed rejoinders to these replications, denying that the safe involved was in the possession of the Cycle Company at the time alleged in the replication, denying that when taken by the attachment writ, the property was in the apparent possession of the Cycle Company, or that the Cycle Company was apparently carrying on its sale in its own name, and denying that the transactions involving the mortgage proceedings were with a fraudulent intention of hindering and delaying the plaintiff.

On the issues raised by these pleadings a trial was had before a jury, in April 1904, and the jury first returned a verdict for the plaintiff, finding the debt \$2,000 and assessing the damages at the sum of \$1,650 with interest at 5% per annum from October 11, 1897, to April 26, 1904, and also returned special findings on certain questions submitted to them as follows:

The question: "What was the value of the property replevied?", they answered "\$1,760."

The question: "Did the receiver ship the property in question or any part thereof to Jones and Jennings in Chicago?", they answered "No."

The trial judge refused to receive the general verdict (the *ad damnum* in the writ and declaration being only \$2,000), and instructed the jury that the verdict should not exceed \$2,000. Whereupon the jury retired and returned a verdict for the plaintiff finding the debt to be \$2,000, and assessing damages at \$2,000.

The court then denied a motion for a new trial made by

the defendant and a motion to arrest judgment. Judgment being entered on the verdict the present appeal is prosecuted. Errors have been assigned and argued involving the admission and exclusion of evidence and the giving and refusal of certain instructions and asserting the verdict to be against the weight of the evidence. Complaint is also made of the refusal to submit at the instance of the defendant certain special questions of fact to the jury. These matters will be discussed in the opinion so far as seems necessary.

Cross errors have been assigned by the plaintiff, who asks, however, for an affirmance of the judgment.

GREGORY, POPPENHUSEN & McNAB, for appellant.

HELMER, MOULTON & WHITMAN, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The questions raised by this appeal are sufficiently disclosed by the statement of the pleadings prefixed to this opinion.

Although (erroneously as we think) the papers and proceedings in the attachment suit of the Gilliam Manufacturing Company, a West Virginia corporation, against the Hamilton Kenwood Cycle Company were excluded from evidence by the trial judge, it stands admitted by the pleadings (having been although first in a rejoinder denied, afterward in a plea alleged, by the defendant, as well as set up by the plaintiff in replications) that such an attachment suit was begun on October 4, 1897.

The main issue in the case is whether the levy of that attachment gave to the attaching creditor a right to the goods attached superior to that proven by the defendant in this suit to have existed in the plaintiff in the replevin suit from which this action on the bond resulted.

The plaintiff in a replevin suit must of course rely on his own right to possession and not on the weakness of his adversary's claim, and it may have been for that reason that the learned trial judge held the attachment proceedings im-

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material. A right of possession, however, that may be good in a claimant against some persons may not be against others, but must yield to some superior lien or interest. In the case at bar, although the attachment proceedings were excluded as immaterial and incompetent, we think it could not be reasonably urged that Lettellier, the replevin plaintiff, could not have sustained a replevin suit against third parties, for example, who had stolen the goods in question. Some claim of right the proceedings in Grand Rapids set out in the pleadings and the actions and events connected therewith in Chicago, gave him. As before stated, the question in this case is: was such right superior to that gained by the Gilliam Manufacturing Company by its attachment of October 4, 1897?

The trial court, as the record shows, proceeded on the theory that as Lettellier was a purchaser at a receiver's sale, his right was not so superior as to property not located in Michigan at the time of the appointment of the receiver by a court of that State or not thereafter brought into Michigan so that the receiver might take possession of it. Instruction 7 was given, and (although perhaps objections to its form might have been superadded reasons) instruction 37 was probably refused, by the trial judge on this theory. The jury found, as the special part of their verdict indicated, that the receiver did not ship any part of the property in question to Chicago. This was practically tantamount to a finding that it had never been in his possession in Michigan, for the evidence clearly showed such a course of dealing between Grand Rapids and Chicago as to this property before it was attached that if it had so been in his possession in Michigan it must have been he who shipped a large part of it to Chicago. It follows, therefore, that if they regarded the instruction of the court and entertained the opinion expressed concerning the relations in fact of the receiver to this property the jury could not have returned a different verdict. Whether their special finding of fact was not against the weight of the evidence will hereafter be considered. We are here concerned with the question whether instruction 7

correctly stated the law. If it did not, the error was one demanding a reversal, for under it, although the jury might have believed that Baars, the trustee under the mortgage, after he had taken possession of the property covered by it and before the appointment of the receiver, had sent goods to Chicago, or that a change of possession from the company to Lettellier of goods originally in Chicago had been effected by some other means than shipment of them to Michigan and reshipment to Chicago after the appointment of the receiver, (both which hypotheses were possible under the evidence) yet for the value of such goods they must have found a verdict for the plaintiff.

The appellee contends that instruction 7 correctly states the law of Illinois. He argues that although the chattel mortgage of the Cycle Company to Baars was a voluntary conveyance, its foreclosure and the appointment of Mr. O'Brien as receiver was a proceeding *in invitum*, that a receiver appointed in a proceeding *in invitum* has no right to act beyond the jurisdiction appointing him, or that at all events any action ostensibly taken by him in Illinois entirely outside such jurisdiction can avail nothing against an attaching creditor, resident or non-resident, who chooses to ignore it. Unless therefore the goods attached had been in Michigan, during the receiver's tenure of office, he could not have conveyed any right to them to Lettellier. This view seems to have been adopted by the trial judge and to have controlled his rulings in the cause. We cannot agree with it.

The Illinois cases relied on by counsel to support it, such as Rhawn v. Pearce, 110 Ill., 350; May v. First National Bank, 122 Ill., 551; Woodward v. Brooks, 128 Ill., 222; Townsend v. Cox et al., 151 Ill., 62, do not, we think, establish a rule of such strictness, and when they are examined in connection with Heyer v. Alexander, 108 Ill., 385; C. M. & St. P. Ry. Co. v. Keokuk, 108 Ill., 317; Consolidated Tank Line Co. v. Collier, 148 Ill., 259, the following doctrine is in our opinion found to be the law of Illinois.

A foreign receiver, or a foreign assignee whose office

and power are statutory, and to whom no voluntary conveyance has been made, cannot effectively convey real estate in Illinois, nor can he obtain the assistance of the courts of Illinois to secure the possession of chattels in this jurisdiction. If he has given no notice of his claim to debtors of the estate residing in Illinois, before a garnishment is made, he cannot defeat such garnishment by attaching creditors, either resident or non-resident, of Illinois. But if without the aid of the Illinois courts he has taken actual possession of chattels in Illinois, or has notified debtors of the estate residing in Illinois of his claim, before an attachment is made, his claim (if it results from laws or proceedings not contrary to the public policy of Illinois) will be recognized and protected against such attachment unless the attachment is by a citizen of Illinois. As distinguished from a receiver or assignee purely statutory and appointed *in invitum*, a foreign voluntary assignee, for the benefit of creditors, may have, in proper cases, the aid of Illinois courts to secure possession and control of property in Illinois conveyed to him, and, as against foreign attaching creditors, he will be protected in his right to all the property in Illinois of which he does obtain possession. But neither a voluntary assignee, nor one purely statutory, from a foreign jurisdiction, nor a receiver appointed by a foreign court, can successfully hold property of which he has not obtained possession in the jurisdiction appointing him, against attaching creditors of the insolvent estate who are citizens of Illinois. If this be the law of Illinois, it conforms, we think, to that of many other states as shown by their reported decisions. With it, instruction 7 in the case at bar is not in accord, for that instruction took altogether from the jury the question whether Lettellier or the receiver from whose sale he derived title had taken possession in Illinois of goods not in Michigan at or after the receiver's appointment. If such possession had been taken, then according to the law as we hold it to be, Lettellier's claim would prevail over that of a foreign attaching creditor.

We do not, however, think this is the only reason for holding the instruction erroneous. It proceeds, as does the argu-

ment of counsel in support of it, entirely on the assumption that the appointment of O'Brien as receiver was a proceeding *in invitum*, and that he held, under the action of the court in appointing him and the action of the parties after his appointment, only the right of possession which he would have held had he been appointed in a purely hostile proceeding between the parties to the suit. We view the transactions differently. It is apparent that the Hamilton Kenwood Cycle Co. on June 19, 1897, being in a financially embarrassed condition, desired so to arrange its affairs and assets that while the assets should reach as far as possible toward the extinguishment of its indebtedness, there should in any event be preferred five certain creditors, chief among which was the National City Bank of Grand Rapids. To accomplish this result the company made a mortgage of its chattels to one Baars as trustee, Baars being cashier of the bank. In addition to this it assigned to Baars the accounts and claims due to it, at least certain of them—apparently all. All this was to secure certain debts arranged in classes of priority, the five creditors to be primarily preferred constituting the first class. The mortgage provided that so long as the trustee considered it advisable the property covered by it might remain in the possession of the Cycle Company which might carry on its business as usual, but that whenever the trustee deemed the interests of his beneficiaries demanded he should have the right to take immediate possession and the right of foreclosure. The intent and substance of the transactions are shown by the fact that immediately after due record of the mortgage Baars took steps towards the possession of all the property mortgaged. It is contended by appellee that such steps did not constitute in law the actual reduction to possession of the goods in Chicago, a position we will hereafter advert to; but the intent to take legal possession immediately cannot be disputed, nor can it be disputed that such taking of possession was not opposed by the mortgagor company but on the contrary was by it assisted and expedited.

After two months in which Baars was the ostensible di-

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recting head of the business, he filed a bill to foreclose the chattel mortgage, and in it asked for the appointment of a receiver both of the chattels unsold pending the foreclosure sale and of the accounts assigned and not yet collected, to preserve the one and collect the other and dispose of both as might be directed by the court. To this bill the Cycle Company answered admitting every allegation and thus in effect joining in the prayer of the bill. Thereupon the court, reciting that it did so on the motion of the complainant, counsel for the defendant appearing, and "not opposing," appointed as receiver T. J. O'Brien (a lawyer of Grand Rapids), "he being recommended therefor by the parties to the suit." The trustee Baars then immediately turned over to the receiver, or certainly attempted to do so, all the property which had come into his possession as mortgagee and did this with the evident assent of the former managers and directors of the company. Three weeks later, by a consent decree (it being so expressly recited therein) it was ordered by the court that the mortgaged goods remaining unsold should be sold "by or under the direction of the receiver * * * or by a Circuit Court Commissioner," etc., and the proceeds applied to pay the mortgage indebtedness. Accordingly, the receiver, in the language of his report, "charged by the solicitor for the complainant with the execution of said decretal order," sold at auction to Francis Lettellier as the highest bidder, all the property for \$15,000. The sale was at once in another consent decree confirmed by the court and the property ordered delivered by the receiver to Lettellier and it was so done, certainly so far as the receiver could do it, while the \$15,000 was paid to Baars for distribution among the five primarily preferred creditors.

If we look at the substance rather than the shadow of things, we must consider these proceedings much more like a voluntary assignment with preferences by the Cycle Company, than a hostile "*in invitum*" sequestration of its property by a foreign court into the hands of a foreign receiver. Such a voluntary assignment, whatever its validity had it been made in Illinois, was valid in Michigan, and under the

authority of the Consolidated Tank Line Co. v. Collier, 148 Ill., 259, should therefore be so held here. It would not appear to be like the assignment in Townsend v. Coxe, 151 Ill., 62, contrary to the public policy of the State. It would seem that as delivery of chattels by the rightful owner gives a *prima facie* title, the delivery of the goods in question by the company to Baars, by Baars to O'Brien and by O'Brien to Lettellier, all in the pursuance of a plain intent to carry out an original and lawful design of the company to prefer with their proceeds certain creditors, would pass, so far as the conflicting claims of the Gilliam Co. are concerned, the title to said goods irrespective of whether or not they were in Michigan at or after the appointment of the receiver. Instruction 7, however, left no question concerning such a delivery outside of Michigan to the jury.

In still another view the instruction is erroneous. If it should be conceded that the title to the chattels in Chicago did not pass to the receiver because he was in form an officer appointed *in invitum*, why could he not, without taking the goods into his possession in Michigan, convey to Lettellier a good title under the decree of the court? Independently of his appointment as receiver he was designated in the alternative by a court of competent jurisdiction in Michigan, as the person to carry out a decree of foreclosure sale of a valid chattel mortgage, where the mortgagee claimed to be in possession. If the goods in Illinois were included in the Michigan chattel mortgage, and especially if Baars was in possession of them, as mortgagee, could not the Michigan court with the parties before it, through a judicial sale by an officer specially designated to make it, convey the title to the chattels under the mortgage which it is admitted was a voluntary conveyance? The case of Rhawn v. Pearce, 110 Ill., 350, relied on by appellee, holds that a sequestration *in invitum* in favor of a purely statutory assignee or receiver does not pass title to property outside of the appointing jurisdiction, but we know of no case which holds that a competent foreign court cannot make a valid foreclosure sale, through its appointed agent or commissioner, of chattels once covered

by a mortgage within its own jurisdiction and sent to another by the mortgagee, or even of chattels covered in terms by the mortgage and of which the mortgagee has taken possession in such other jurisdiction.

The giving of this seventh instruction we therefore hold erroneous.

But it is argued by counsel for appellee in effect that even if such instruction does not state the law, the verdict and judgment should be upheld because the description of the property in Chicago, if said property is to be held included in the mortgage at all, was so vague and indefinite as to render the mortgage invalid as to it, in default of record in Illinois, and of possession, and that there is no competent evidence in the record that either the mortgagee, receiver or purchaser took possession of it. The language by which it is alleged that the chattels belonging to the company in Chicago are described is certainly very general and we should be inclined to hold insufficient to identify and hold said property, if it had not been further identified and claimed by the mortgagee's taking possession of it. But we do not agree with the proposition that there is no proper evidence in the record to show that such possession was taken. We think the evidence clearly establishes the fact that the great bulk of the goods which were attached were not in Chicago at the time of the execution of the mortgage and that they were sent to Chicago thereafter by the trustee, the receiver and Lettelier, who were successively in possession of the business of the Cycle Company at Grand Rapids. It would be useless in this opinion to collate the evidence to this effect, which has been thoroughly discussed in the respective briefs of the parties. Jennings, Holland and Sligh made direct statements, which both the primary and secondary documentary evidence adduced clearly confirmed, inconsistent with any other state of facts.

It is not necessary for us perhaps to pass on the objection so strenuously urged to all the secondary evidence that the proper foundation in a search for the original documents had not been laid for it, because although cross errors are

assigned on its introduction, we could not disregard it in this investigation and affirm the judgment, as though no such evidence was in the record. Such is not the effect of the assignment of these cross errors. We can only, if the case is to be remanded, give effect to such assignment by instructions to the trial court. We do not, however, think the assignments are well made. It seems to us that a sufficient showing was made to justify the trial judge in the rulings which admitted the secondary evidence. Any detailed discussion of this would be superfluous, for at another trial the showing might be in either direction widely different.

Of defendant's Exhibit 22, purporting to be a list of the bicycles attached, it may be said that while the evidence as to the date of its preparation is by no means as clear as could be wished, a fair inference is that it might have been made at the time of the attachment and not a year afterward, as argued by appellee. By inspection of the record (rather than of the abstract) it appears that Jennings in answer to the question whether he could identify the goods attached, swore that there was a list made up *at the time of the attachment*. Sligh afterward testified that he made a request of Jones & Jennings for a list of all the wheels that were covered by the attachment, and received in reply Exhibit 22. Jennings further testified that Exhibit 22 was in his handwriting. While it would appear from the memorandum at its head that Sligh received it in 1898, it by no means follows that it was then made up. The best that can be said of it is that the date of its preparation is doubtful. But as before indicated, there are direct statements of witnesses that the goods attached were not in the Chicago store at the date of the mortgage. It is argued that the witnesses for the defendant were discredited by inconsistencies and indefiniteness in their testimony. Careful examination and consideration of it do not produce that impression on us, and we cannot avoid the conclusion that the evidence clearly shows that the property attached was almost all sent to Chicago after the mortgage was made and the trustee had taken possession of it, and that the special finding of the jury that the receiver

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did not ship any part of it to Jones and Jennings in Chicago is entirely unwarranted.

But even the contrary view would not of necessity justify the verdict and judgment as we view the law. Possession of the goods in Chicago might, in our opinion, have been taken in this case by the mortgagee, the receiver or the purchaser (certainly by the mortgagee or the purchaser), without said goods ever having been in Michigan. The legal possession of property in the physical custody of factors or bailees may change by notice to the bailees of change of title, assented to by them and acted upon by their acknowledgment of a new agency. Such a change is claimed by appellant in this case, but by the rulings of the court the question whether such a change took place was entirely taken from the jury. By declining to give instruction 37 as asked and neglecting to express the essential proposition it contained by any modified form of it, the trial judge showed his apparent disagreement with the principle involved. We think also that even on the theory of the trial court, instruction 40 should have been given as more explicitly stating what he perhaps deemed involved in instruction 7. Instruction 10 we think misleading. We do not deem it necessary to discuss it, nor do we think it necessary, in the view which we take of the record in this case, that we should now decide whether or not instructions 33 and 35, which were refused, should have been given. The doctrines they express do not lack authority. *Lowe v. Matson*, 140 Ill., 108; *Hodges v. Hurd*, 47 Ill., 363.

Counsel for appellee contend that as against an attaching creditor, such change of possession as might be effectual as between the vendor, vendee and bailees, would not avail if unaccompanied by "outward, open, actual and visible signs," which they say did not exist in this case. This might well be if credit were obtained on the strength of the unchanged outward condition of things, but when no estoppel can be claimed because of the situation, we do not see the force of the proposition. Especially it lacks such force when, as in effect was the case here, notice in regular course has

been given the creditor of the alleged change of title before the attachment. It is urged that mailing in due course with proper address is not evidence of any actual notice. It raises a *prima facie* presumption of reception, in our opinion. If the attaching creditor did receive notice of the receiver's sale, and in pursuance of such sale the bailees after receiving notice of it, actually held for the purchaser, the title having actually changed, it would be highly unreasonable, in the absence of any estoppel in favor of the creditor, to hold him unaffected by such change because of the lack of outward signs. So to hold would be to make the "outward sign" superior to the "inward grace."

There is, of course, an aspect of the case in which such absence of outward signs of change and the evidence introduced and received of the use of the Cycle Company's name after the alleged transfer of possession to Baars and after the receiver's sale, are pertinent, material and competent testimony. It is related to the theory of appellee expressed in its brief that the proceedings through which Lettellier acquired his claim were all *mala fide*, and a fraudulent attempt on the part of the Cycle Co. to rid itself of its debts. If such a condition were proven, it would undoubtedly follow, as counsel contend, that a verdict for appellee would be justified. But two things must be noted in relation to this theory. First, this verdict and judgment could not be allowed to stand because of it, unless it was so clearly and convincingly proven as to leave no room for doubt in our minds, because under the instructions and rulings under which this case was tried below, there can be no presumption that the jury based their verdict upon it. Secondly, the proceedings being on their face regular, valid and effective under the law, the burden of proving them undertaken and carried through with a fraudulent intent is clearly on the appellee. That no such burden has been sustained by it, in the evidence presented in this record, we think is evident. The testimony of Sligh, so strenuously insisted on by appellee, that the bank received none of the purchase price from Lettellier, seems to us a mere inadvertence due to a miscon-

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ception of the question asked him and speedily corrected when his attention was called to it. That the Cycle Company intended to prefer certain of its creditors, with its assets, to the exclusion of others, in the hope that its managers might thereafter reap in business and credit from those preferred a reward for the favor shown them, seems very probable, but in the absence of statutes to the contrary, which did not exist in Michigan when these transactions took place, there was nothing in the eye of the law fraudulent actually or constructively in such intention or the means by which it was carried out.

The judgment must be reversed and the cause remanded for a new trial.

We do not think it necessary to comment more minutely on various points urged in relation to the admission of evidence and the instructions, for in another trial the identical questions are not likely to arise, and the general principles which we think govern the case have been expressed.

The instruction regarding interest we think was in accordance with the rule laid down by the Supreme Court.

At another trial it is possible that different or additional facts may be developed bearing on the rights of the parties. On this record as it stands, however, we think the plaintiff was entitled to only nominal damages, the costs of the replevin suit and attorneys' fees.

Reversed and remanded.

National Bank of the Republic v. F. W. Young, for use of Berriman Bros.

Gen. No. 12,012.

1. **EXECUTION**—*what not subject to.* Money on deposit in a bank is not subject to levy upon execution, and a payment by the bank upon demand of the sheriff, pursuant to execution against a depositor having funds on deposit, is, in law, a voluntary payment, unless made by the previous consent or subsequent ratification of such depositor.

Garnishment proceeding. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Reversed and judgment here. Opinion filed December 4, 1905.

PHELPS & CLELAND, for appellant.

SAMUEL J. HOWE, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

May 14, 1901, Edward Berriman and Matthew Berri-man recovered judgment against F. W. Young, in the Circuit Court of Cook county, for the sum of \$236.25. Execution was issued on said judgment and was returned by the sheriff, no property found and no part satisfied. May 14, 1901, garnishee summons was issued for appellant and others, on the judgment, and was served on the appellant the same day. June 18, 1901, appellant filed its answer to interrogatories to it, as garnishee, stating in substance that, at the time of service of the writ, it had no property, money or effects of F. W. Young in its possession or control. The answer was traversed and a trial had, and the jury, by direction of the court, found the issues for the plaintiff, and that there was due and owing from appellant to F. W. Young the sum of \$324.09, at the time of the service of the writ, and the court, after overruling a motion for a new trial, entered judgment on the verdict.

Appellant's counsel states the case as follows:

"The undisputed facts in the case are that F. W. Young, who conducted a restaurant in the city of Chicago, had on deposit with the National Bank of the Republic on May 10, 1901, the sum of \$774.09. On that date two justice court writs of attachment against Young were served on the bank as garnishee, one of said writs being for the sum of \$150 and one for the sum of \$200, which respective amounts the bank charged against Young's account, together with \$50 additional in each case to cover costs and attorney's fees. Young afterward confessed judgment in these two attach-

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ment cases and judgment was rendered against the bank as garnishee for \$150 and \$200 respectively, and costs, which, amounting with attorney's fees to \$450, the bank paid, and the propriety of such payments is not questioned in this proceeding. This left the sum of \$324.09 in the bank to the credit of Young, and on May 11, 1901, an execution for the sum of \$4,700.23 was issued against Young in favor of H. H. Pattee and delivered to the sheriff of Cook county for service. The sheriff went to the appellant bank and demanded the said sum of \$324.09 to apply on said execution. Thereupon the bank turned over the said amount to the sheriff, charging the same against Young, and closing his account, and the sheriff made on said execution the following return: 'I have this day levied upon and taken as the property of F. W. Young, \$342.09 by virtue of execution No. 79570, Circuit Court of Cook county, issued May 11, 1901. Charles A. Wathier, Deputy Sheriff.' Three days later the garnishment in the present suit was served on the bank, which answered as above stated that it had no money or other assets belonging to said Young."

This statement is sustained by the evidence.

There is not a particle of evidence that F. W. Young, prior to May 14, 1901, or on that day, gave any order to the bank to pay any money to the sheriff, or approved or assented in any way to the action of the bank in turning over the money to the sheriff on the execution in favor of Pattee. It is true that Young testified that at the time the garnishment suit was brought appellant owed him nothing, but this, as will be shown, was a mere conclusion of law. When Young deposited his money in the bank it became the bank's money, and the sheriff could not levy on it as the property of Young. These propositions are not contested by appellant's counsel. When Young deposited his money with appellant the relation between him and appellant was that of creditor and debtor. *Marine Bank of Chicago v. Chandler*, 27 Ill., 525, 547; *E. J. Tinkham & Co. v. Heyworth*, 21 Ill., 519; *Ward v. Johnson*, 95 Ill., 215, 241.

In *Munn v. Burch*, 25 Ill., 35, the court, after referring

to the custom of banks as to payment of checks, say: "It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check, shall, *upon presentation*, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit." *Ib.* 40. The case is referred to in *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill., 531, as the leading case in this country, stating the nature of the contract. Young's money having become appellant's by his depositing it with appellant, when it turned over to the sheriff \$324.09, the amount of Young's balance in the bank, without any check, order, direction or assent of any kind from Young, it turned over its own money, not Young's, and placed itself in the position of voluntarily, and without request, paying another's debt. "Money paid voluntarily by one with knowledge, or means of knowledge, of all the facts, cannot be recovered back." *Walser v. Board of Education*, 160 Ill., 272, 276, citing *Elston v. City of Chicago*, 40 Ill., 514.

The supposition that a bank may voluntarily pay the debts of its depositors, without any request so to do, cannot be entertained for a moment. If such were the law, bank deposits would rapidly cease. No one would make deposits in a bank if such were the law.

Counsel for appellant asked the cashier of the bank, "Has Mr. Young made any claim against your bank since the 14th day of May, 1901?" "I will ask you whether or not Mr. Young has, to your knowledge, a claim of any kind against your bank?" The court ruled against both questions. Counsel made no offer of proof. They say here: "If Young had made no claim against the bank since its payment to the sheriff, this was a circumstance which the defendant was entitled to have go to the jury for what it was worth, with all the other evidence in the case, as showing no indebtedness of the bank to Young." We do not concur in this view. The

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money was turned over to the sheriff May 11, 1901, the writ of garnishment was served May 14, 1901, and it does not even appear that Young, at the last date, knew of the money having been paid to the sheriff. But mere silence on Young's part, or failure to make a demand, after service of the writ, and after the right of the judgment creditors had accrued, would not avail the appellant. There is no escape from the facts, that, at the time the writ was served appellant had not paid to the sheriff Young's balance at the bank, \$324.09, but had paid to the sheriff a like sum of its own money, so that, at the time of the service of the writ, there remained in the bank \$324.09 to Young's credit. There can be no doubt, on the facts, that Young could have recovered this amount from appellant, and if he could, in a suit instituted by himself, then the judgment creditors can recover in his name, for their use. Young's testimony on the trial, that he had no claim against appellant, and that appellant did not owe him anything, may well be considered as a ratification of the action of appellant as to the remainder of the \$324.09, after deducting therefrom the amount of the judgment of the Berrimans and interest thereon; but it is ineffective as to the amount of that judgment and interest. We think, therefore, that there should be no judgment for such remainder. We are not inclined to force a judgment against the appellant on Young, for his own use. Therefore, the judgment will be reversed and judgment will be entered here, in the name of F. W. Young, for the use of Edward C. Berriman and Matthew W. Berriman, for the sum of \$236.25, with interest at the rate of five per cent. per annum since May 14, 1901, amounting in all to \$289.95. Appellee to recover his costs in this court, for the use of the Berrimans.

Reversed and judgment here.

Chicago Union Traction Company, et al., v. Minnie May.**Gen. No. 12,123.**

1. **PEREMPTORY INSTRUCTION**—*when motion for, properly denied.* A motion for a peremptory instruction is properly denied where there is evidence fairly tending to support the plaintiff's case.

2. **EVIDENCE**—*when admission of, cannot be complained of.* The admission of evidence cannot be complained of on appeal where its admission was not objected or excepted to.

3. **INJURY**—*how question of cause of, to be determined.* The question as to what was the cause of a particular physical condition or ailment, where the evidence is conflicting, is to be determined by the jury.

4. **EARNING POWER**—*what evidence competent in connection with alleged loss of.* Evidence as to what the plaintiff actually did earn during the period of disability alleged in the declaration is competent in an action on the case for personal injuries.

5. **VERDICT**—*when not excessive.* A verdict for \$15,000 held not excessive where the plaintiff at the time of the accident was married and of the age of about 29 years, and the evidence shows that before the accident she was healthy and had had no serious illness and no female complaints, and that prior to the accident she did her own housework, including washing, ironing, baking, etc., that she was active and frequently walked from the business part of the city to her home, a distance of four or five miles, and that, in addition to doing all her housework, she was able to earn about \$300 per year doing millinery work, and that since the accident she has been and is a confirmed invalid, a mere wreck of her former self, and is not only unable to do the work which she formerly did, but cannot even walk a short distance without suffering pain as a consequence of the effort, and where there is no evidence of unfairness on the trial or of passion, prejudice or partiality.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905.

Statement by the Court. This is an appeal from a judgment for the sum of \$15,000, recovered by appellee against the appellants, the Chicago Union Traction Company

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and the West Chicago Street Railroad Company, in case for negligence, *per quod* plaintiff was injured. The case went to the jury on a second amended declaration filed January 20, 1904, as amended, consisting of three counts. The first count avers, in substance, that the West Chicago Street Railroad Company, to-wit: May 5, 1901, was the owner of a street railway in Robey street, in the city of Chicago, and allowed the Chicago Union Traction Company to operate its passenger cars thereon, and the plaintiff, to-wit, the day and year aforesaid, became a passenger on a car operated by the Chicago Union Traction Company, whose duty it was to so operate its cars on said street railway as to keep plaintiff safe from injury; but said defendant so carelessly and negligently operated its car on which plaintiff was a passenger, that, while plaintiff was exercising due care for her own safety, she was thrown with great force and violence upon and against the side of said car, and was injured, and the spine and nervous system of plaintiff was bruised, wounded, etc., and certain of her pelvic and abdominal viscera were deranged and injured, etc., and she was obliged to and did expend divers sums of money, to-wit: \$2,000, in endeavoring to be cured, and suffered great pain and agony thence hitherto, "and was and is hindered and prevented from transacting and attending to her business and affairs, and lost and was deprived of divers great gains and profits, which she might and otherwise would have acquired."

The second count, after averring the relation between the appellant companies, as in the first count, avers, in substance, that the plaintiff attempted to board and become a passenger on one of the Chicago Union Traction Company's cars, at the intersection of Potomac avenue and Robey street, which car was stationary, for the purpose of receiving passengers, and that the said defendant, not regarding its duty in that behalf, and while plaintiff was exercising due care, caused said car to be suddenly and violently started and moved, thereby causing plaintiff to be thrown with great force and violence against the side of said car and injured, etc.

The third count avers, in substance, that plaintiff became

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a passenger on the car, when it was stationary, at the intersection of Potomac avenue and Robey street, for the purpose of receiving passengers, and that it was the duty of defendant to afford plaintiff a reasonable opportunity to board said car in safety; but the defendant, the Chicago Union Traction Company, did not regard its said duty, and caused said car to be suddenly and violently started and moved, while she was in the act of boarding the same, and exercising due care, so that she was thrown with great force and violence against the side of the car and injured, etc. Each of the appellants pleaded the general issue. The jury found for the plaintiff and assessed her damages at the sum of \$15,000, and judgment was rendered on the verdict.

JOHN A. ROSE, ALBERT M. CROSS and HENRY W. BRANT, for appellants; W. W. GURLEY, of counsel.

HARRY W. McEWEN and LLOYD CHARLES WHITMAN, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Counsel for appellants advance and argue certain propositions which will be considered in their order.

First, the court erred in refusing the peremptory instruction as to the whole case, and also as to the second and third counts of the declaration. At the close of all the evidence each of the appellants moved the court to exclude all the evidence from the jury, and to instruct the jury to find it not guilty, and presented an instruction to that effect; and each of them also moved the court to instruct the jury to find it not guilty on the second count of the declaration and also on the third count of the declaration. A separate motion was made as to each of said second and third counts. The court overruled all of said motions and refused to instruct as requested. We gather from the argument of counsel for appellant, and from what they said to the trial court, on making their motions as to the second and third counts, that the motions were based on the theory that the evidence failed to

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show that the car was suddenly and violently started, before the appellee had a reasonable opportunity to board the same, and that it was suddenly and violently started while the appellee was a passenger. The evidence tends to prove that the car was stationary, for the purpose of receiving passengers, when the appellee was attempting to board it, and that it started with a jerk while she was so attempting, and therefore the question, whether the car was suddenly and violently started, when the appellee was attempting to board it, was a question for the jury, and the court properly refused appellant's motions and instructions as to the second and third counts. But even though there were no evidence that the car was suddenly and violently started, there would be no error in the ruling of the court on the motions as to the second and third counts; because the first count is merely for negligent management of the car, resulting in injury to appellee, and the appellee's evidence is admissible under that count. *Swift & Co. v. Rutkowski*, 182 Ill., 18.

A motion to take the whole case from the jury, by excluding all the evidence, or by instruction to find for the defendant, or defendants, as the case may be, can only be allowed when there is no evidence fairly tending to support the plaintiff's case, or no evidence of some element so essential to a recovery that, without proof of it, there could be no recovery. *Roberts v. C. & G. T. Ry. Co.*, 78 Ill. App., 526, 529-30, and cases cited. In *Met. El. Ry. Co. v. Fortin*, 203 Ill., 454, 456, the question on a motion of defendant to take the case from the jury, is thus stated: "Such motion presents to this court a question of law and not one of fact, and is in the nature of a demurrer to the evidence; that is, admitting the evidence in favor of the plaintiff to be true, does it, together with all legitimate conclusions to be drawn therefrom, fairly tend to sustain the plaintiff's cause of action? If it does, then, as matter of law, the plaintiff is entitled to have his case passed on by the jury."

The conductor of the car in question, called as a witness by appellants, testified that he was in the front end of the car facing north, the car moving south on Robey street, and

saw appellee standing on the crossing of Potomac avenue and Robey street, waiting to get on the car; that the car came to a stop at Potomac avenue, and he held it until appellee got on and then started it.

George Bixly, witness for plaintiff, testified that he was in the front seat of the car facing the front; that he first saw appellee when she attempted to board the car; that the car started forward as she had placed her foot on the running board and threw her back, and he reached out and caught hold of her, and with his assistance, she boarded the car. He also testified that immediately after he helped her on the car she looked very pale. The appellee testified, substantially, that she put her left foot on the running board, and took hold with her left hand, when the car started with a jerk and threw her around backward, twisting her back, in which she felt a severe pain; that she then became faint, and didn't remember who assisted her into the car until she came to her senses; that, afterward, the conductor came to her and said that he didn't see her; that, after recovering from her faintness, she experienced pain in her back, shooting up into the back of her head, and numbness in her left side and limb; that she stayed on the car till it reached Van Buren street, when she alighted, with the assistance of two gentlemen, and that a lady assisted her onto a Van Buren street car, on which she rode to Washtenaw avenue, when the conductor of that car assisted her to alight; that then she walked about a block to 1160 Jackson boulevard, the house of Miss Hannah, her friend, where she remained until after dark, when Miss Hannah assisted her to board a Western avenue car, on which she rode to Potomac avenue, where the conductor assisted her to alight, and she walked thence to 164 Potomac avenue, where she lived. Appellee then proceeded to relate the ailments and suffering which she attributes to the accident, and which will be referred to hereafter.

Miss Hannah testified that May 5, 1901, she saw appellee in front of the house, 1160 Jackson boulevard, about four o'clock; that appellee rang the bell, and she, witness, went to

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the door; that appellee said nothing when she came in, but sat down in a chair and remained silent three or four minutes before she could speak; that she stayed there two and a half or three hours, and that witness stayed with her and helped her to get on a car.

There is other evidence fairly tending to support appellee's case, and we think it clear that appellants' motions to take the case from the jury were properly overruled.

Second. It is objected that the court admitted improper evidence as to the damages.

April 1, 1903, and December 10, 1903, appellee underwent surgical operations. Dr. Moore, appellee's attending physician, was present at both operations, and Dr. Henrotin performed the operations. Dr. Moore testified that at the first operation there were removed a cyst as large as a large orange from appellee's left ovary, a degeneration of that ovary, three-fourths of the right ovary, in which degeneration had taken place, and part of the left Fallopian tube; that at the second operation a cyst about the same size as the former one, and the remainders of the right ovary and of the Fallopian tube were removed.

Dr. Henrotin testified that at the first operation he removed from the right ovary a cystic tumor the size of a large fist, also the Fallopian tube and ovary, which last was completely diseased, also a small tumor from the body of the uterus; that at the second operation he removed a cyst which had grown to quite a large size, which was between the walls of the broad ligament and the location of the first operation, on the right side, as he thinks, and also removed what remained of the ovary from the former operation, and the left Fallopian tube.

The appellee testified to the performance of the two operations, but, naturally, did not describe them.

The argument in support of appellants' contention is that the evidence of the physicians who testified in the cause shows that the cysts, etc., removed were not caused by the accident, but no objection was made, or exception preserved, so far as appears from the abstract, to the admission of the evidence

as to the operations, or what conditions were found, and, therefore, appellants are not in a position to claim here that the evidence was improperly admitted.

At the close of appellee's case the appellants moved to strike out all evidence in regard to tumors of the ovary and fibroid tumors of the womb, and all evidence relating to the two operations in which tumors, the ovaries and Fallopian tubes were removed, and all evidence of neurotic pain resulting from the condition of the pelvis which preceded the operation, or followed as a consequence of it, on the ground that the evidence established no connection between the accident and the conditions mentioned, or either of them.

At the close of all the evidence, counsel for appellants, apparently for greater caution, divided the foregoing motion into four parts, and made four motions to strike out evidence, each motion being a part of the foregoing motion. Appellants also asked the court to give the following instruction:

"1. The court instructs the jury that the plaintiff has failed to prove by a preponderance of the evidence that the tumors and ovarian and womb troubles were caused by the accident complained of, and in considering and deciding this case you should wholly disregard all the evidence introduced in this case as to such tumors and ovarian and womb troubles, and also as to the surgical operations she underwent as a result thereof, and also as to any nervous condition which resulted from such trouble or from said operations."

The court overruled all of said motions and refused the instruction.

We are of opinion that all the evidence with regard to the physical condition and health of appellee from the time of the accident, and with regard to surgical operations performed on her, was competent and material, and that it was a question for the jury to decide, under proper instructions, what ailments or pains were caused by the accident, and what, if any, were not so caused. The question as to what

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caused the injury was a question of fact for the jury. Ill. Cent. R. R. Co. v. Smith, 208 Ill., 608, 617. Therefore, the court did not err in overruling the motions to exclude evidence, or in refusing the instruction above quoted. The question whether the appellee's ailments, or any of them, were, as she claimed, or were not, the result of the accident, was submitted to the jury by the following instruction, given at appellants' request:

"9. The jurors are instructed, that with respect to the ailments and disabilities claimed for the plaintiff in this case the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show by a preponderance of the evidence not only that such ailments really exist, or have existed, but also that such ailments and disabilities are the result of the accident in question. The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident. The jury are not to understand from this instruction* that the court intends to intimate that the plaintiff has such disability as she claims or that the defendants are in any manner liable, or to intimate any opinion upon that or any other question of fact in this case."

Third. It is objected that the court erred in admitting evidence that appellee, in the year next preceding the accident, earned about \$300, making waists, gowns, etc. We perceive no error in this regard. Nothing is more common in cases of this class than to permit evidence on the part of the plaintiff of his earnings prior to his injury. The evidence was competent, and the general averment in the declaration that the plaintiff was hindered and prevented from transacting and attending to her business and affairs, and lost and was deprived of great gains and profits, is a sufficient basis for its introduction. C. & E. R. R. Co. v. Meech, 163 Ill., 305, 314.

In heading 2 of appellants' brief it is claimed "the damages are excessive," but the only argument in support of this claim is that damages based on the evidence which appel-

lants moved the court to strike out should not be allowed. Appellee is married and was twenty-nine years of age at the time of the accident. The evidence is, that before the accident she was healthy and had had no serious illness and no female complaints, and that prior to the accident she did her own housework, including washing, ironing, baking, etc.; that she was active and frequently walked from the business part of the city to her home on Potomac avenue, a distance of four or five miles, and that, in addition to doing all her housework, she was able to earn about \$300 per year doing millinery work, and that since the accident she has been and is a confirmed invalid, a mere wreck of her former self, and is not only unable to do the work which she formerly did, but cannot even walk a short distance without suffering pain as a consequence of the effort. We find no evidence of unfairness in the trial, or of passion, prejudice or partiality on the part of the jury, and we cannot, in view of the evidence as to appellee's physical condition, which is too voluminous for specific reference, hold that the sum assessed as damages is excessive. There are quite a number of errors in the abstract furnished, some of them quite material. For instance, the abstract of Dr. Kolischer's evidence contains the following: "There are two kinds of coccygodynia, a spontaneous and a traumatic one. From an examination of the patient I am unable to tell whether or not it is traumatic or spontaneous." Turning to the page of the record referred to in the abstract, we find the following: Q. "From the examination of a patient are you able to determine whether coccygodynia is traumatic or of the other class?" A. "Yes, sir." The error is important, because the Doctor testified that he examined appellee and found the cocyx and the sacro-iliac joint diseased, and would ascribe the condition to violence or some force, and that it may have been caused by a sudden twisting; also, that, as a rule, patients suffer from traumatic coccygodynia as long as they live. We presume this error in the abstract was owing to inadvertence, especially as it is continued on page 39 of appellants' argument.

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We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

Chicago Union Traction Company v. Christina Hansen.

Gen. No. 12,128.

1. INSTRUCTIONS—*when party may except to giving of.* A party has a right to except to the giving and the refusing of instructions at the time they are respectively given or refused, and the court is without power to preclude a party so excepting to urging as grounds for new trial, the rulings upon such instructions by submitting the instructions proposed to be given and refused prior to the final giving or refusal of the same, and suggesting at the time of so submitting the same to the respective counsel, that criticism be then made, and that if not then made, none would thereafter be entertained.

2. INSTRUCTIONS—*right of party to have theory given to jury.* Where the evidence tends to sustain a party's theory of a case, he is entitled to instructions specifically upon such theory, where he has asked such instructions.

3. ORDINARY CARE—*defined.* Ordinary care is such care as a person of ordinary prudence and caution would have exercised in the circumstances surrounding the plaintiff or in like circumstances.

4. ORDINARY CARE—*when instruction as to, cannot be complained of.* An instruction requiring the exercise of a higher degree of care than the law demands cannot be complained of by a party against whom it was not directed.

5. INTEREST OF PLAINTIFF—*defendant entitled to have instruction given as to.* A defendant corporation is entitled to have the jury instructed with respect to the interest of the plaintiff as affecting his credibility.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed December 4, 1905.

JOHN A. ROSE, ALBERT M. CROSS and HENRY W. BRANT,
for appellant.

THOMAS E. ROONEY, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment recovered by appellee against appellant for the sum of \$4,000.

The original declaration contains four counts, and an additional count was filed March 31, 1904. The negligence averred in each count is as follows:

First count. That while the plaintiff was in the act of getting on one of defendant's cars, at or near the intersection of Madison and State streets, defendant, with great force and violence, suddenly started the car, by reason of which plaintiff was thrown upon and against the car with great force, etc., and was injured, etc.

Second count. That defendant negligently failed to stop the car a reasonable length of time to enable plaintiff to enter it.

Third count. Negligent failure to keep proper watch or lookout, so that the car would not be started before plaintiff had safely boarded or entered it.

Fourth count. Negligent management of car, *per quod*, plaintiff, while attempting to board the same, was injured.

Additional count. Negligence in starting the car, while plaintiff was attempting to get on it, and while she was a passenger, etc.

The appellant pleaded the general issue.

The train which appellee claims she attempted to board at the time of the alleged injury was a Milwaukee avenue train, consisting of a combination grip-car and one trailer, and was operated by a cable. There was a conductor on the grip-car and also on the trailer or rear car. The route of the car was east on Madison street, an east and west street, to State street, a north and south street. A train turns into State street by a curve of the track to the left, so that when it passes the curve it is headed directly north in State street. It then proceeds north in State street one block, to the intersection of State and Washington streets, the latter street being an east

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and west street. It then turns into Washington street, by a curve to the left, and proceeds west in Washington street, on its return trip westward. When the train in question moved east toward State street, on Madison street, and was nearly to the curve at the intersection of Madison and State streets, it was stopped to discharge passengers. The plaintiff testified, in substance, that she walked from the south side of Madison street to the rear platform of the trailer, or rear car; that the conductor of that car was on that platform and faced toward her; that the car was standing; that she grabbed the zinc or metal of the dashboard of the platform with her left hand, and put her left foot on the step; that she had in her right hand a package of six oranges and an umbrella, and the car started, and the conductor ran to her, grabbed her by the cape and pulled her up so that she had both feet on the step; that she went backwards and was about to fall off, when the conductor grabbed her and held her in that position till the car reached Washington street and stopped, when he pulled her onto the platform and said, "Get in there." The following question and answer occurred in her examination:

Q. "State whether or not, when the car started, and while it was going around State street, and while it was making the turn on Washington street, whether or not you had succeeded in getting any more of your body on the car? A. No, I did not get any more on the car before the car stopped, and then the conductor pulled me up."

The attempt of plaintiff to board the car occurred November 29, 1900, between two and three o'clock p. m. She is married, was about 53 years old at the time of the alleged injury, and weighed about 185 pounds. She testified that the conductor was a small man.

Bernard Bennigsen, the conductor of the rear car, testified, in substance, that when the car had nearly reached State street the train stopped and the passengers were unloaded, and a lady and child boarded his car and took a seat in it, and he then rang the bell and the car started up, and the train was moving unusually slow, very slowly, around the curve, when he saw appellee standing in the street, with a

bundle in her hands about two feet long and a foot in diameter, and that she threw the bundle on the platform and took hold of the grab-iron of the car and the grab-iron of the dashboard, and stepped pretty swiftly onto the car; that he was standing near the edge of the platform and put his hand out and grabbed her on the back, and, with his left hand reached up and gave three bells, the emergency signal, and the car moved four feet and came to a standstill, and appellee stepped onto the platform and went into the car and sat down. Also, that when he put out his hand to assist her, he only held her as long as it took the car to move four or five feet, and that where she attempted to get on the car was about where the curve rounding into State street commences.

Ernest G. Wetzell, conductor of the combination grip-car, testified that the first he knew of the matter, he got and gave to the gripman three bells to stop; that they were going slowly around the curve, and that the gripman applied the brakes and stopped the car, and that appellee then went into the car and sat down. Witness also testified that, at the time he received the emergency signal, the front end of the train was on State street and the rear end on the curve, and that, after he gave the emergency bell, the train ran from three to five feet. The gripman testified, in substance, that all he knew about the matter was, that he went very slowly around the curve, and when he was around it, the emergency bell sounded and he stopped immediately.

It is apparent from the foregoing evidence that appellee's testimony that the car was standing when she tried to board it, is directly contradicted by the conductor of the rear car, and that her testimony that she stood on the step of the rear platform, held there by the conductor until the train turned west onto Washington street, is contradicted by both the conductors. The conclusion we have reached renders it unnecessary to refer further to the evidence.

Before the court instructed the jury the presiding judge handed to the attorney for each of the parties a set of the instructions, including all those which had been marked given and those which had been marked refused, and re-

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quested them to make such criticisms in respect to the instructions as they would thereafter make, on motion for a new trial, and intimated to the attorneys that criticism or objections not then made he would treat as waived and would not consider on motion for a new trial. The attorney for each party protested, and said he was not then prepared to point out objections to the instructions which the court proposed to give to the jury for the other party. Appellee's counsel now contends that appellant is precluded from making objections to instructions which it did not urge in the trial court, as requested by the court. This contention cannot be sustained. In *Hake v. Strubel*, 121 Ill., 321, 326, the practice is thus stated: "By an unbroken line of decisions it has been held by this court that the exception must be taken at the time the alleged erroneous ruling or decision was made; and, also, that the bill of exceptions should show upon its face that the exception was taken at the time, and the bill signed, sealed and filed during the term. But to meet the varying exigencies, and for the convenience of bench and bar, the practice early obtained of allowing time in which to present the bill of exceptions, by an order entered of record in the cause, or by a written stipulation of parties filed in the case; and the time thus allowed often extended beyond the term, and the correctness of this practice has been repeatedly sanctioned by this court. See *Evans v. Fisher*, 5 Gilm. 453; *Burst v. Wayne*, 13 Ill., 664; *Brownfield v. Brownfield*, 58 id., 152; *Goodrich v. Cook*, 81 id., 41."

The bill of exceptions in this case, which is signed and sealed by the presiding judge at the trial, and is part of the record, shows that appellant excepted to the giving of each of appellee's instructions, and to the refusal of such of appellant's instructions as the court refused to give, and that the exceptions occurred at the times of giving and refusing the instructions. Parties, by the well-established practice, have the right to urge, on motion for new trial, objections to the giving or refusal of instructions, and it is not within the power of the trial court to change the practice or unreasonably limit the right, and a party moving for a new trial

should have reasonable time and opportunity to consider the instructions of the opposing party, and present to the court such objections as he may have to the same. Such course enables the trial court to review its rulings on instructions, when, if it finds the giving or refusal of any instruction fatally erroneous, it should set aside the verdict and grant a new trial, thus saving the delay and expense of an appeal or writ of error.

Appellant's counsel object to the appellee's 2nd, 3rd and 4th instruction. The 2nd is as follows:

"The court instructs the jury that ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances."

The word "skill" should not have been used in the instruction, but the use of it could not prejudice the appellant, as it requires a greater degree of care on appellee's part than the law requires. Neither do we think that the word "usually" should have been used. Ordinary care is such care as a person of ordinary prudence and caution would have exercised in the circumstances surrounding the plaintiff, or like circumstances. *Chicago City Ry. Co. v. Schuler*, 111 Ill. App., 470, 472.

Appellant's 18th instruction defines ordinary care thus: "Ordinary care is such care as a person of ordinary prudence would exercise under the same or like circumstances." We do not think the jury could have been misled, to appellant's prejudice, by the 2nd instruction. We find no reversible error in appellee's 3rd and 4th instructions, or either of them. Appellant complains of the refusal to give the 5th, 6th, 8th, 9th and 10th instructions requested by appellant. The 5th and 6th instructions are to the same effect. The 6th is as follows:

"6. The court instructs the jury that if you believe from the evidence, under the instructions of the court, that the plaintiff attempted to board or enter the defendant's car

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after said car had started and was in motion, and if you believe from the evidence under the instructions of the court, that the plaintiff's act in so attempting to enter or board said car when same was in motion, was negligent and contributory to her own injury, if you believe from the evidence she did so attempt to enter or board said car when the same was in motion, then the jury should find the defendant not guilty."

Appellant's theory, which the evidence tends to sustain, is that appellee attempted to board the car while it was in motion, and after it started to move around the curve at Madison and State streets. When the evidence tends to support the theory of a party, he is entitled to have the jury instructed on that theory. *Chicago Heights Land Ass'n v. Butler*, 55 Ill. App., 461; *Fessenden v. Doane*, 89 ib., 229; *Same v. Same*, 188 Ill., 228, 232; *Kendall v. Brown*, 74 ib., 232.

The instruction is not covered, as appellee's counsel contends, by appellant's 18th and 19th instructions, or either of them. Instruction 18 is an instruction, in general terms, stating that it was incumbent on the plaintiff to prove that she exercised ordinary care, and instructing the jury that if they believed from the evidence that she did not, and that her want of ordinary care caused, or proximately contributed to cause, the injuries complained of, they should find the defendant not guilty. It was a material and contested question whether or not the car was standing or had started, when appellee attempted to board it. The conductor of the car and appellee were the only witnesses as to that question, and their evidence is directly contradictory, as we have shown. The appellant was entitled to a specific instruction on the question, directing the attention of the jury to the question, which the general instruction 18 did not. *Railroad Co. v. Camper*, 199 Ill., 569, 577; *Mallen v. Waldowski*, 203 ib., 87.

Instruction 19 for appellant is not a substitute for the refused instruction, because it excludes all negligence on the part of the defendant, which the refused instruction did not.

There is some awkward repetition in appellant's 6th refused instruction, but we are of opinion that it, or its equivalent, should have been given, and that its refusal was error.

Appellant's refused 8th instruction is as follows: "8. The jury are instructed that while the law permits the plaintiff in the case to testify in her own behalf, nevertheless the jury have the right in weighing the evidence to determine how much credence is to be given to it, and to take into consideration that she is the plaintiff and interested in the result of the suit."

In *W. C. St. R. R. Co. v. Dougherty*, 170 Ill., 379, the trial court refused to give to the jury an instruction word for word the same as instruction 8. This court affirmed the judgment of the trial court; but the Supreme Court reversed the judgment of this court, on the sole ground that the refusal of the instruction was error, and remanded the cause. In *Schlesinger v. Rogers*, 80 Ill. App., 420, the following instruction asked by the defendant was refused: "The jury are instructed that, in considering the weight to be given to the testimony of the plaintiff, Belle Rogers, you have a right to take into consideration that such testimony is given by the plaintiff in the suit." The court say, *ib.* 422: "This instruction was proper, and where, as in this case, there is a sharp conflict of evidence, and it is important that the jury should be correctly instructed, its refusal was error," citing *W. C. St. R. R. Co. v. Dougherty*.

The statute, which, modifying the common law rule, permits a party to a cause to testify, expressly provides that the interest of a party testifying "may be shown for the purpose of affecting the credibility of the witness" (Rev. Stat. C. 51, sec. 1); that is "shown" to the jury for the evident purpose of having the jury consider the interest of the party in passing on the credibility of his testimony. The question, therefore, in the last analysis, is whether the court should refuse to instruct the jury as to the law clearly applicable to the facts in evidence. This question cannot be correctly answered otherwise than negatively. We think the refusal of appellant's instruction 8 is reversible error.

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We think appellant's 9th instruction should have been given, but in view of appellee's 3rd instruction, which correctly states how the credibility of witnesses should be determined by the jury, we are not inclined to hold that its refusal is reversible error. *Cicero St. Ry. Co. v. Rollins*, 195 Ill., 219.

We also think that appellant's 10th instruction should have been given. *Chicago City Ry. Co. v. Osborne*, 105 Ill. App., 462, 467. The case is, as we have shown, a very close one, on the evidence, for appellee. In such case the jury should be properly and accurately instructed, and the defendant should have such appropriate instructions as the evidence warrants. The refused instructions 9 and 10 have frequently been approved. In view of our conclusions, and as there may be another trial, we deem it inexpedient to pass on the question, whether the verdict is, or not, contrary to the weight of the evidence.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

**W. B. Conkey Company v. Oscar Goldman,
Administrator.**

Gen. No. 12,135.

1. CORPORATION—*what sufficient sealing by.* A scroll may be adopted and used by a corporation as its seal in the execution of a legal instrument upon which a seal is designed to be used.

2. EXECUTION—*what sufficient proof of, by corporation.* Where the execution by the corporation of an instrument in suit is denied by verified plea, all other proof having been made, it is not essential that proof of the authority of the executing officer be shown, if the corporation, being the party denying such execution, has acted under the instrument in question and has thus recognized its existence.

3. APPRENTICESHIP—*what breach of contract of.* The removal by a master of his entire plant from the State in which the contract of apprenticeship was made and contemplated to be performed to

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another State, is a breach of such contract for which damages may be recovered rendered in an action of covenant.

Action of covenant. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905. Rehearing denied December 14, 1905.

NEWMAN, NORTHRUP, LEVINSON & BECKER and C. E. CLEVELAND, for appellant.

HOFHEIMER & LEVINSON and ADOLPH D. WEINER, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

William Goldman sued appellant in covenant. He died pending the suit, and appellee, his administrator, was substituted as plaintiff, and recovered judgment for the sum of \$382.61.

The suit was brought on the following instrument:

"ARTICLES OF AGREEMENT entered into between the W. B. Conkey Company, of Chicago, Cook County, and Wm. Goldman and Charles Goldman, minor.

This Indenture Witnesseth that William Goldman, of the County of Cook, State of Illinois, has voluntarily, of his own free will and accord, put and bound Charles Goldman, his son, apprentice to W. B. Conkey Company of the City of Chicago, County of Cook, State of Illinois, to learn the art and trade of book binder and as apprentice to serve from this date for and during and until the full end and term of four years next ensuing; during all which time the said apprentice shall serve his masters faithfully, honestly and industriously, their secrets keep and all lawful commands readily obey, and to demean himself in a modest, courteous and accommodating manner towards his masters and all other persons employed in and about the premises and business of his said masters; at all times protect and preserve the goods and property of his said masters, and not suffer any to be wasted or injured; and, it being the custom in said business to work at least ten hours per day, the

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said apprentice shall also employ himself in and about the premises of his said masters during the time of at least ten hours per day during the full term of his apprenticeship.

And the said masters shall use and employ the utmost of their endeavors to teach, or cause him, the said apprentice, to be taught or instructed in the art and trade of book binder.

And the said W. B. Conkey Company further agree to pay the said Charles Goldman the following sums of money, viz: For the first year of his service the sum of 6 mos. \$5.00, 6 mos. \$6.00 Dollars per week; for the second year of his service the sum of 6 mos. \$7.00, 6 mos. \$8.00 Dollars per week; for the third year of his service the sum of 6 mos. \$9.00, 6 mos. \$10.00 Dollars per week, and for the fourth year of his service the sum of 6 mos. \$11.00, 6 mos. \$12.00 Dollars per week, payable at the expiration of each week of actual work.

AND IT IS FURTHER AGREED, That in case the said Charles Goldman fully and satisfactorily performs his duties as set forth in this contract, the said W. B. Conkey Company will pay him at the expiration of this contract the sum of Fifty (\$50.00) Dollars as a bonus for the true and faithful discharge of his obligations.

IN WITNESS WHEREOF, The parties aforesaid have hereunto set their hands and seal this 14th day of January, in the year of our Lord one thousand eight hundred and ninety-seven (A. D. 1897).

W. B. CONKEY COMPANY,
(Signed in Duplicate.) W. B. Conkey, Pres. (SEAL.)
WITNESS: H. P. Bogle. Wm. Goldman, (SEAL.)"

No question is raised as to the sufficiency of the declaration. Appellant pleaded *non est factum* verified and a special plea that Charles Goldman, wrongfully and without appellant's consent, left its service. The cause was tried by the court, without a jury.

Charles Goldman, called by appellee, testified, in substance, that he was 22½ years old, and was the son of William Goldman, deceased, and January 14, 1897, was living with his parents in the city of Chicago in this State, and was,

at that date, working for appellant; that January 14, 1897, he was in the office of appellant when the contract was made, and William B. Conkey and William Goldman, witness' father, signed the instrument above set forth; that witness, after the instrument was signed, continued to work for appellant until August 20, 1898, when appellant removed from Chicago to Hammond in the State of Indiana; that witness was paid up, in accordance with the contract, till the last-mentioned date; that August 20, 1898, the book-binding establishment of appellant was removed from Chicago to Hammond, Indiana, and that, after that date, no book binding was done by appellant in Chicago, and that when appellant's establishment was so removed, witness looked for work elsewhere, because he did not want to leave his home, with his parents, in Chicago.

On cross-examination witness testified that W. B. Conkey told him that the whole plant was to be moved to Hammond, Indiana, and that witness remained with appellant till the last day the plant was in Chicago, and saw it moved, and knew that appellant had no other plant in Chicago.

The appellant did not offer any evidence.

Appellant's counsel contend that the instrument sued on does not purport to be signed by any agent or officer of the company; that there is no evidence that Mr. Conkey signed the company's name in its behalf; that the seal opposite the signature "W. B. Conkey, Pres.," is the personal seal of Mr. Conkey, and not the seal of the company, and that there being no seal of the company, covenant will not lie. The evidence is that the signature "W. B. Conkey" is the genuine signature of W. B. Conkey, and he signs the name of the company as president of the company.

In *Smith v. Smith*, 62 Ill., 493, a deed of conveyance was put in evidence, purporting to be from the Mississippi & Atlantic Railroad Company, which was signed "John Brough (R. R. Seal) Vice Pres. and Acting Pres. M. & A. R. R. Co." It was objected that the deed was not executed by the proper officers of the company, etc. The court say: "In the absence of legislative enactment or provision made in the

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by-laws, corporations usually act through their president, or those representing him. He being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body. And, as a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead, and perform the duties which devolve upon the president."

It will be observed that the seal, which is like that in this case, was next after the signature of the vice-president. The case is cited with approval in *Ashley Wire Co. v. Ill. Steel Co.*, 164 Ill., 149, 152, and in numerous other cases.

In *Wood v. Whelen*, 93 Ill., 153, 162, the court say: "The execution of a mortgage under the seal of the company, regular on its face, by the proper constituted officer, is *prima facie* evidence it was executed by the authority of the corporation, and parties objecting take on themselves the burden of proving it was not so executed."

In *Mullanphy Savings Bank v. Schott*, 135 Ill., 655, 666, the court say, in respect to certain bonds and trust deed in question: "The bonds and the Krone deed of trust were executed by the president and secretary of the corporation, and under its seal, and this was *prima facie* evidence that they were executed by the authority of the company"; citing *Wood v. Whelen*, 93 Ill., 153. See, also, *Phillips v. Coffee*, 17 Ill., 154, and *Springer v. Bigford*, 166 ib., 495, 498.

The objection to the seal is based on its character and on the fact that it is next after and opposite the signature "W. B. Conkey, Pres." The contract purports, on its face, to be the contract of the appellant, and, immediately preceding the signature, these words are used: "In witness whereof, the parties aforesaid have hereunto set their hands and seal, this 14th day of January, in the year of our Lord one thousand eight hundred and ninety-seven (A. D. 1897)." Section 1 of chapter 29 of the Revised Statutes provides: "That any instrument of writing to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation, to

all intents, as if the same were sealed." Hurd's Rev. Stat. 1903, p. 435. Manifestly the word "maker" includes corporations. In *Reynolds' Heirs v. Trustees of Glasgow Academy*, 6 Dana (Ky.) 37, the trustees were a corporation, and the question was presented, whether they could use a "scroll" as a corporate seal, and, if they did, whether the "scroll" attached to each of their names might be taken as their corporate seal. The statute of Kentucky provided that "any instrument to which the person making the same shall affix a scroll, by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed," and the court, after quoting the statute, held that the word "person" included corporations, and said: "A corporation may, therefore, adopt and use a scroll as their common seal, as well as individuals, under the provisions of the foregoing statute." It does not appear from the opinion that there was in Kentucky, as there is in this State, a statute providing that the word "person" may be applied to bodies politic and corporate. The word "maker" in our statute is more accurate, in the connection in which it is used, than the word person, in the Kentucky statute.

In 1st *Morawetz on Corporations*, section 340, it is said: "A corporation, like an individual, may adopt any seal which is convenient for the occasion," citing numerous cases.

In 2nd *Cook on Corporations*, section 722, the author says: "The courts will hold any device or form to be the corporate seal, if there was an intent to bind the corporation, and if the device was intended for the corporate seal," citing cases in note 3.

In *Ill. Cent. R'd Co. v. Johnson*, 40 Ill., 35, the signature to the appeal bond, as it appeared in the transcript of the record, was, "The Illinois Central Railroad Company, by J. M. Douglas, Atty. in fact. (SEAL.)" It was objected that the bond was not executed by the corporation, but by J. M. Douglas, under his private seal, in respect to which the court say: "This court does not know, judicially, that the railroad company has a seal other than a scrawl, such as appears in this record, and which purports to be a seal."

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In *Miller v. Superior Machine Co.*, 79 Ill., 450, an appeal bond in question was thus signed: "Superior Machine Co., by J. G. Struve, Agt. (Seal)." The court say: "It is contended that the seal was that of the agent, and not that of the company. We do not know, judicially, that the Superior Machine Company had a seal other than a scrawl, such as appears in the record, and which purports to be a seal. *Illinois Central Railroad Co. v. Johnson*, 40 Ill., 35. In the absence of proof, the presumption is that the seal used was the proper and only seal of the company. *Phillips v. Coffee*, 17 Ill., 155."

In *Consolidated Coal Co. v. Peers et al.*, 150 Ill., 344, it was objected that a certain lease in question was not executed by the Abbey Coal & Mining Co. That company was named in the lease as the party of the second part. The attestation clause was, "In witness whereof the said parties have this day subscribed their names and affixed their seals. Dated December 20, 1870." The parties of the first part, two in number, signed their individual names, and opposite thereto affixed scrawls by way of seals. The signature for the company was "E. J. Crandall, President," and next after the word "president" and opposite thereto was a scrawl, by way of seal. The court overruled the objection, *ib.* 356, citing, pp. 357-358, *Phillips v. Coffee*, 17 Ill., 154; *Ill. Cent. R. R. Co. v. Johnson*, 40 Ill., 35, and *Sawyer v. Cox*, 63 Ill., 130.

In *Proprietors of the Mill Dam Foundry v. Hovey*, 21 Pickering, 417, the contract was between the foundry, a corporation, and Wm. Hovey. The execution on the part of the corporation was: "Robert Ralston, Jr., Treasurer for the Proprietors of the Mill Dam Foundry," and next following and opposite the word foundry was what consisted "of a wafer and a small bit of paper stamped with a common desk seal of a merchant." The court held that the instrument was a sealed instrument as to both parties to it, saying: "Now seals are in fact affixed to the instrument produced, and the legal presumption is, that they were placed there as the seals of the parties. The presumption must prevail until it should be rebutted by competent evidence. It has been

said that the seal does not appear to be one of a corporation. But a corporation as well as an individual person, may use and adopt any seal. They need not say that it is their common seal. This law is as old as the books. Twenty may seal at one time with the same seal."

In Lovett v. State Saw Mill Association, 6 Paige, 54, 60, Chancellor Walworth says: "The seal of a corporation aggregate affixed to a deed, is of itself *prima facie* evidence that it was so affixed by the authority of the corporation; especially if it is proved to have been put to the deed by an officer who was entrusted by the corporation with the custody of such seal. (See 1 Kyd on Corp. 268; and Angell & Ames on Corp. 115.) And it lies with the party objecting to the due execution of the deed to show that the corporate seal was affixed to it surreptitiously or improperly; and that all the preliminary steps to authorize the officer having the legal custody of the seal to affix it to the deed, had not been complied with."

It is objected, however, that there is no evidence that W. B. Conkey was president of the corporation, and that it was incumbent on appellee, in view of appellant's plea of *non est factum* verified, to prove that he was such president. Charles Goldman testified that W. B. Conkey executed the instrument, and also that he, Charles, worked for the W. B. Conkey Company from January 14, 1897, till August 20, 1898, and was paid therefor in accordance with the terms of the contract. Charles Goldman could not have worked for appellant during more than seven months and been paid by appellant, as stated, without its knowledge, and we think the fact that he so worked and the fact that he was so paid show a ratification of the contract by appellant, which ratification recognizes that W. B. Conkey was president, and that the seal opposite his name is the seal of the company. In Atwater v. Am. Exchange Bank, 152 Ill., 605, 620, it is said: "When a principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard to afterwards impeach them, under pretense that they were without authority."

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Appellant's counsel further contend that, as the sums mentioned in the contract were, by the terms of the contract, payable to Charles Goldman, the contract was for his benefit, and the right of action was in him, and not in appellee's intestate, William Goldman. The contract sued on is that of appellant and William Goldman. Charles Goldman is not a party to it. It is under seal as to each of the parties, and, therefore, Charles Goldman could not maintain an action on it. *Webster v. Fleming*, 178 Ill., 140, 150. The language of the court, which is as follows, is applicable here: "At common law, only an action of covenant or debt could be brought upon a sealed instrument. The rule that, when one person covenants with another to pay money to or perform some act for the benefit of a third person named in the deed, the action must be brought in the name of the covenantee in the deed, and cannot be maintained by the third person in his own name, even though he is a party in interest, and even though it is expressly stated to be for his benefit, has its origin in the nature of the action of covenant, inasmuch as only a party to the instrument under seal can bring an action of covenant or debt. (5 Ency. of Pl. & Pr., pp. 343, 345, 352, 357, 358, and cases referred to in notes; *Hager v. Phillips*, 14 Ill., 260; *Gautzert v. Hoge*, 73 id., 30; *Moore v. House*, 64 id., 162.)"

Charles Goldman was a minor during the whole term of four years specified in the contract, and the evidence is that he lived with his parents. In *Ford v. Henry H. McVay*, 55 Ill., 119, a contract was made between Bernard McVay, the father of Henry H., and Fuller & Ford, in which it was provided, as in the present case, *nomine mutatur* that Fuller & Ford should pay to Henry H. McVay, who was a minor, certain sums of money per week. The court held, that, before a recovery could be had in the name of the minor, "it was necessary to show, by express arrangement, or from such circumstances as that it might be inferred, that the father had given his son his time, so as to entitle him to receive his own earnings," and that there was no such evidence in the case, and the court reversed the judgment of the trial court, in

favor of the minor, on the ground that he could not maintain the action. The court also held that the contract was void as to the minor, not being in conformity with the statute in regard to apprentices, but was binding on the father.

The appellant's counsel cite *Ziegler v. Fallon*, 28 Mo. App., 295, in which case the court held that the minor plaintiff could recover, on the ground that, by the terms of the contract, the wages were to be paid to the minor, and, therefore, the wages became the minor's property. This is directly contrary to the decision in *Ford v. McVay*, *supra*. It appears clearly from the reasoning in the *Ford-McVay* case, that even though such contract as that in question were not under seal, there could be no recovery by the minor, in the absence of evidence that his father had emancipated him, and that the fact that the minor's wages were payable to him, by the contract, was not such evidence.

It is contended that there is no evidence that Charles Goldman was ready, able and willing to perform, and that there should have been a tender of performance by him or on his behalf. That he was ready, able and willing to perform is evidenced by the fact that he performed services, in accordance with the contract, until the time appellant removed its plant from Chicago to Hammond, Indiana; and the fact that appellant paid him for such services, in accordance with the terms of the contract, is evidence that the services were satisfactory. If, as appellee's counsel contend, appellant's removal of its entire establishment and business from Chicago to Indiana, thus rendering it impossible for Charles Goldman to perform the services in Chicago, was a breach of the contract by appellant, then no tender of Charles' services was necessary.

Appellant's counsel contend that there was no breach of the contract by appellant, saying that the contract contains "no agreement that appellant would maintain its manufacturing establishment in the city of Chicago," but citing no authorities on the question.

In *Coventry v. Woodhull*, *Hobart's Reports*, top p. 290, marg. p. 134a, the plaintiff, apparently the father of an ap-

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prentice, sued the defendant, to whom the apprentice was bound, in covenant, for sending the apprentice out of the Kingdom, on a voyage to Bantam in the East Indies. The defendant pleaded that he so sent the apprentice, in the company of expert surgeons, the better to learn the art. The court, on demurrer to the plea, held it bad, saying, among other things: "And, generally no man can force his apprentice to go out of the Kingdom, except it be so expressly agreed, or that the nature of his apprenticeship doth import it; as if he be bound apprentice to a merchant adventurer, or a sailor, or the like." In note 1 by the American editor, Williams, J., of Massachusetts, it is said: "The doctrine of this case is recognized in Douglas 70, The King v. Stockland; 1 Mass., 172, Hall v. Gardiner; 8 Mass. 299, Davis v. Coburn; 19 Johnson, 113, Nickerson v. Howard." In the note should be 1 Doug. 70. We have examined the cases cited, and find the note to be correct.

In Coffin v. Bassett, 2 Pick., 356, the master sued in covenant, for the apprentice having left his service, and the defendant pleaded that the plaintiff was about to remove the apprentice from Massachusetts to Louisiana, to which the plaintiff replied *de injuria sua propria, absque tali causa*. The court, on demurrer, held the replication bad, saying: "We think it very clear from all the authorities, that an indenture of apprenticeship gives no authority to the master to transport the apprentice beyond the jurisdiction within which the contract was entered into, and with reference to which the parties contracted." Numerous cases are cited in support of the text.

In Davis v. Coburn, 8 Mass., 299, the plaintiff, to whom the minor had been bound by articles of apprenticeship, entered into in New Hampshire, undertook by contract with the defendant, a resident of Massachusetts, to assign to him the services of the apprentice for a remaining part of the term of apprenticeship. The consideration for the assignment was \$150 to be paid by the defendant. The case was submitted for decision on an agreed statement of facts. The court say: "That a father, during the minority of a child, should have a

power to dispose of a requisite portion of his authority, for the purposes of education and instruction, is frequently important and necessary to the welfare of the child; but in doing this, a due regard to the interest of his child will render him cautious to what hands he confides the trust; and for this purpose a wise and prudent parent will be as anxious about the moral qualities of the man, to whom he delegates his authority, as to his competency in other respects. But all his attention in this regard would be useless, if the master might immediately transfer or assign his authority to another; not merely within the limits of the State to which he belongs, but, as was the case here, into another independent jurisdiction. And if he could transfer him into Massachusetts, I see not why he might not have sent him to Georgia, or even to China. That a master should have such a legal authority would be monstrous; and if he have it not, to exercise it is a violation of natural right, and immoral, and consequently can be no good consideration for the support of an action. But the decision of the question does not *now* depend upon reason alone. It has long been determined by authority."

Randall v. Rotch, 12 Pick., 107, is to the same effect, Shaw, C. J., delivering the opinion.

In Vickere v. Pierce, 3 Fairfield, 315, the plaintiff, Vickere, covenanted with the defendant, Pierce, that the apprentice should serve the former for three years at the trade of a house carpenter, the apprentice joining in the contract. The contract was entered into in Maine, and the plaintiff, in a little more than two years after the date of the contract, required the apprentice to go with him to the province of New Brunswick, which the apprentice refused to do, and the question was, whether this refusal was a breach of the contract. The court held not, saying: "The contract into which Bean and Pierce entered was with reference to employment as apprentice to learn the trade of house-carpenter within this State. No provision is made for pursuing the business or giving instruction in any other government. And unless it is distinctly communicated in the agreement, it must be deemed a violation of the spirit of the contract, to trans-

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port the apprentice out of the State." Citing authorities.

In *Commonwealth v. Edwards*, 6 Binney, 202, the court is even more emphatic, saying: "An apprentice cannot be taken out of this State, not even with his consent nor that of his guardian; for the guardian cannot be supposed to have the power of contracting for such purpose, the law of the State not expressly giving it, and perhaps it could not give it, so as to have the extraterritorial effect of continuing that apprenticeship beyond the jurisdiction."

Walters v. Morrow, 1 Houston (Del.) 527, is a case in which the facts are very similar to those in the case at bar. The contract, which was not a statutory one, was made in the city of Wilmington, Delaware, where the parents of the minor resided, and the defendant, during the term of service contracted for, removed his business from Wilmington to the city of Baltimore in the State of Maryland. The court held that, by such removal, the defendant put it out of his power, and the power of the other parties to the contract, to perform its stipulations.

Section 16 of the Apprentice Act, Hurd's Rev. Stat., p. 161, provides: "It shall not be lawful for any master to remove any clerk, apprentice or servant, bound to him as aforesaid, out of this State without the consent of the county court," etc. The contract in question is not a statutory one, but, as held in *Ford v. McVay*, *supra*, it is valid, at common law, and binding on the father and appellant, and we think section 16, above referred to, may be fairly regarded as declaratory of the policy of this State in respect to minors situated as was the minor, Charles Goldman.

The removal by appellant of its entire plant from the city of Chicago, Illinois, to Hammond, Indiana, was a breach of the contract in question. It is assigned as error that the damages are excessive, but this is not argued, and, therefore, must be deemed waived.

The judgment will be affirmed.

Affirmed.

Edith A. McLean, Administratrix, v. William H. Dow.

Gen. No. 11,850.

1. NEGLIGENCE—*when question of, should be submitted to jury.* Where the facts are such that reasonable men of fair intelligence may draw different conclusions from them, the question of negligence must be submitted to the jury.

2. PEREMPTORY INSTRUCTION—*nature of motion for.* Such a motion is in the nature of a demurrer to the evidence and hence it admits not only all that the evidence proves, but also all that it tends to prove.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed December 4, 1905.

ELA, GROVER & GRAVES, for appellant.

O. W. DYNES, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

The deceased, John R. McLean, Jr., was killed January 6, 1899, by falling down an elevator shaft from the second story to the floor of the first story of the lumber mill of appellee situate in Waukegan, Illinois. In an action brought to recover damages for his death, the court, at the close of the plaintiff's case, on motion of the defendant, instructed the jury to find the defendant not guilty. From the judgment entered on the verdict thus directed this appeal was perfected.

The mill was about 100x130 feet in its outward dimensions, and was three stories in height. It was used for the manufacture of sash, doors and blinds. It contained the machinery, belting, shafting, etc., used in mills of that character and size; and upon the several floors was material manufactured and in the process of manufacture. The car-

penyer shop occupied the second floor. The bench at which the deceased worked during the day before he met with this accident was in the southeast corner of the carpenter shop. The distance from that bench to the stairs leading down to the first floor was 75 feet. These stairs were near the southwest corner of the shop. Between the bench and the stairs were a small dry kiln, a glue room, each of which was closed by a door, and an elevator shaft about 6x7 feet in size. This shaft was closed by double doors opening outward. One of these doors was fastened by a peg which dropped down into a hole in the floor. On this door was a wooden button, about six inches long, which when turned horizontally against the outside of the other door held that door closed. When the button was turned so that it was perpendicular the second door was released and would open of its own motion. The stairway was guarded by a door which closed automatically.

The mill was lighted by electricity only. The same power which ran the other machinery also ran the dynamo, and therefore the light was shut down by the stopping of the engine.

At the date of his death the deceased was forty-five years old. He was an expert carpenter, a man of more than usual intelligence, in the full possession of all his faculties, industrious, sober, and careful to an unusual degree. His home was in Evanston, Illinois, twenty-five miles from Waukegan. He had never been in the mill until the day before he was killed, when he was there for a short time. January 6, 1899, he came to the mill in the morning and worked at his carpenter's bench all day. The weather was cold and a strong wind was blowing. At 5:35 P. M. the "closing down whistle" sounded. The witness John Lange, who had been in the employ of the defendant for some time, about three minutes before quitting time stopped work and put away his tools. When the whistle blew he took off his apron and put on his coat, overcoat and hat. As soon as the whistle blew the deceased picked up a brush and began brushing his clothes. The two men were talking. Lange looked around and seeing that the other workmen had left

the room, said to the deceased, "You want to get a hustle to get out of here. The lights will be going out in a few minutes or a few moments." Hearing this, the deceased got his overcoat and laid it over his arm. As he did so, Lange turned and walked to the stairs and went down them and out of the building.

W. F. Weise who worked at a bench about half way between the bench where the deceased worked and the stairway, says that when he turned to leave the room the deceased was stooping over his tool chest, and Lange had started for the stairway. This was the last seen of the deceased prior to his injury. An hour and a half later he was found at the bottom of the elevator shaft, semi-unconscious, with a small stick in his hand which he was rubbing along the floor. His overcoat lay near him. The elevator door on the second floor was open. He died thirty-six hours later from the injuries thus received. So far as this record shows, the deceased did not know that the action of the dynamo depended upon the engine only, and that as soon as the steam was shut off the lights would go out. The men who had worked in the carpenter shop a longer time knew this, and consequently each of them hurried to get out of the building. Some of them were in the habit of anticipating the whistle by putting up their tools and changing to their street dress before it was time for it to blow. Witnesses Gustafson, Mallory and Lange put away their tools or had their overalls off before the whistle sounded. There were from 15 to 18 men in the carpenter shop at quitting time. They all, except the deceased, left the building before the lights went out. It seems that the deceased was the last one to leave his bench. When W. F. Weise had gone 200 feet from the building he looked back and saw that the lights were out. When Andrew Gustafson was 100 feet from the mill he turned and the lights in the mill were not burning. When R. C. Mallory had gone 100 feet he also looked back and "the lights were dying out there." Henry Weise says that when he had walked 200 feet the lights were out. This witness also testified that generally the lights did not burn very long after the

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whistle sounded, that at times he had to go down stairs in the dark, that sometimes the workmen would hurry each other for fear the lights would go out, and that when he packed his tools, or delayed a little, the lights went out before he left the second floor.

Not knowing how soon the lights went out after the whistle sounded, the deceased, being unwarned, for the remark of Lange that he had better "hustle," etc., obviously, or at least presumably, came too late, had not reached the stairs when the building was shrouded in darkness; and it seems in groping around for the stairway door he either passed through the elevator door, if it was open, or if it was shut, turned the button and then stepped into the shaft and fell to his death. It was not only the duty of the defendant to furnish to the plaintiff a reasonably safe place to work, but it was also his duty to furnish him, when the time came to quit his work, for a reasonable time thereafter, a reasonably safe exit from the mill. The questions, therefore, arise, were these lights necessary in order that one unacquainted with the premises might leave the mill in safety, and were they extinguished that night so soon after the whistle sounded that an unwarned man did not have a reasonable time in which to put away his tools, resume his street dress and leave the carpenter shop in safety?

Where the facts are such that reasonable men of fair intelligence may draw different conclusions from them, the question of negligence must be submitted to the jury. *C. & N. W. Ry. Co. v. Hansen*, 166 Ill., 623.

On a motion by the defendant that the jury be instructed to find for the defendant, the trial judge cannot weigh the evidence to ascertain where the preponderance lies; he is limited strictly to determining whether there is, or is not, evidence legally tending to prove the fact affirmed. When the evidence must be weighed to determine on which side the preponderance is, the issue should be submitted to the jury, subject to the power of the court to grant a new trial if the verdict should be against the clear preponderance of the evidence. Such a motion is in the nature of a demurrer

to the evidence, and hence it admits not only all that the testimony proves, but also all that it tends to prove. *Rack v. C. C. Ry. Co.*, 173 Ill., 291; *Landgraf v. Kuh*, 188 Ill., 484; *Joliet Ry. Co. v. McPherson*, 193 Ill., 629; *C. C. Ry. Co. v. Martensen*, 198 Ill., 511; *Woodman v. Ill. T. & S. Bk.*, 211 Ill., 578.

From a careful examination of this record we are convinced that there is evidence therein of negligence on the part of the defendant and of due care for his personal safety upon the part of the plaintiff's intestate, which should have been submitted to the jury under proper instructions. It follows that the action of the court in directing the jury to find the defendant not guilty was reversible error.

We therefore reverse the judgment of the Circuit Court and remand the cause.

Reversed and remanded.

**Carter H. Harrison, et al., v. The People of the State
of Illinois, ex rel. Henry Raben.**

Gen. No. 11,980.

1. **DRAM-SHOP LICENSE**—*when mayor without discretion to refuse to grant.* Where the applicant for a dram-shop license has complied with all the laws and ordinances pertaining to the granting of a dram-shop license, the mayor is divested of any discretion to refuse such license, and refusing, may be compelled by *mandamus* to grant the same.

2. **DRAM-SHOP LICENSE**—*what not ground for refusal to grant.* The fact that the proposed dram-shop was to be located immediately next to the grounds of one of the public schools of the city is not ground for the refusal to grant a dram-shop license where the applicant has complied with all other requirements.

Mandamus proceeding. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905.

Statement by the Court. The relator filed a bill against appellants praying for a writ of *mandamus* compelling them to issue to him a license to keep a dram-shop at No. 345 East Division street in the city of Chicago. He alleged that he was a resident of said city, a person of good character and repute, and the lessee of said premises; that he had complied with all the ordinances of the city of Chicago and with all the laws of the State of Illinois relating to dram-shops, had fitted up said premises with saloon fixtures, and had paid to said city the first period license fee, but that appellants refused and do still refuse to grant to him the necessary saloon license to carry on the business of a dram-shop on said premises.

Appellants in their answer to said petition, among other things, say: "That the ordinances of the city of Chicago give to the mayor of said city the power to issue licenses to keep dram-shops in said city, but they aver that the said ordinances do not make it the duty of the said mayor to grant such license to every applicant therefor, and they aver the fact to be that it is within the power of the said mayor to deny an application for a license to keep a dram-shop when the place selected for such dram-shop is not a proper place for such a business to be conducted, and they aver the fact to be that the premises described in said petition are adjacent to a public school, attended by a very large number of children, and that it is not a proper place in which to conduct a dram-shop, and they further aver that persons engaged in mercantile pursuits in that vicinity have protested against the establishment of a dram-shop in said premises, and the said mayor, believing that in so doing he was conserving the best interests of the people, has refused, and still does refuse, to grant a license to keep a dram-shop on said premises."

The cause was submitted to the court for trial upon the following agreed statement of facts:

"It was admitted by the parties that the only ordinance of the city of Chicago regulating the matter of granting licenses to keep dram-shops is as follows:

'1175. The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dram-shops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collector, in the sum of five hundred dollars, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed on Sundays all doors opening out upon any street from the bar room where such dram-shop is to be kept, and that all windows opening upon any street from such bar or room shall, on Sundays, except between the hours of one o'clock A. M. and five o'clock A. M., be provided with blinds, shutters or curtains, so as to obstruct the view from such street into such room. Nor shall any windows be painted or covered in any manner so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed.'

It is admitted that the petitioner made his application for a license to keep a dram-shop at the place in question, and that in so doing he did everything required of him by the laws or ordinances; that no question was or is made of the sufficiency of the bonds tendered by petitioner, or of his good character, and that his application was refused solely because the place where he proposed to keep his dram-shop is immediately next to the grounds of the Lyman Trumbull School, one of the public schools of the city, the mayor being of opinion that he has a right to refuse a license when, in his judgment, the place in which it is proposed to keep a dram-shop is one where a dram-shop will be a detriment and an injury to the neighborhood and offensive to the best interests of society.

It is further admitted that the south school building has not been used regularly in the past two years, that it has not been used but two or three times, though it is ready for

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use; some of the rooms of the north school building are not used, as there are not enough scholars to require the use of the whole building; that the property is held for school purposes and intended for use as a school, and that the location of the proposed saloon with reference to the school, and the surroundings, are truthfully set out in a plat shown in the abstract."

The plat shows that the school grounds are situate on the northeast corner of Division and Sedgwick streets, having a frontage of 184 feet upon the former and of 225 on the latter street. Near the center of these grounds are two school buildings. The lot known as 345 Division street adjoins the school grounds upon the east. The rear of this lot is 55 7-12 feet from the east wall of the south school building, and the rear of the saloon building is 200 feet from the southeast corner of the north school building. From the front of the saloon to the gate leading into the school grounds on Division street the distance is 38 7-12 feet. There are six other saloons and a theatre in the immediate vicinity of these school grounds.

The judgment of the court awarded a writ of *mandamus* requiring appellants to issue to the relator a license to keep a dram-shop on said premises.

WILLIAM D. BARGE, for appellants; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

O'DONNELL & COGHLAN, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

The right to sell intoxicating liquors by retail is not a natural nor a constitutional right. Where such right is given by statute the provisions of the act must be strictly followed or it cannot be exercised. *People v. Cregier*, 138 Ill., 401, 418.

In order to succeed, a party litigant, who prays for the issuance of a writ of *mandamus*, must set forth and establish a clear right to the relief demanded. Every material fact necessary to show that the defendant is under a legal obliga-

tion to perform the act sought to be enforced must be alleged and proved. If the duty be not absolute and the defendant has a discretion in the granting or in the refusing of the privilege sought, *mandamus* will not lie. But if the applicant has complied with the laws and the ordinances governing the matter in controversy, the officer charged with the duty of extending the privilege becomes a mere ministerial agent and has no discretion in the premises. In such case, if he refuse to grant the privilege, *mandamus* is the proper remedy to compel him to perform his duty. *People v. Fletcher*, 2 Scam., 482; *C., B. & Q. Ry. v. Wilson*, 17 Ill., 129; *People v. Hatch*, 33 Ill., 9; *East St. Louis v. Wider*, 46 Ill., 351; *People v. C. & A. Ry. Co.*, 55 Ill., 95; *Commissioners v. People*, 60 Ill., 339; *County of St. Clair v. People*, 85 Ill., 400; *People v. Davis*, 93 Ill., 134; *People v. Crotty*, 93 Ill., 186; *People v. Johnson*, 100 Ill., 543; *Bd. of Supervisors v. People*, 110 Ill., 511; *People v. Bd. of Supervisors*, 125 Ill., 334; *Brokaw v. Commissioners*, 130 Ill., 483; *People v. Hastings*, 6 Ill. App., 179.

In *People v. Fletcher*, *supra*, Risk petitioned the Supreme Court for a writ of *mandamus* directed to Fletcher, clerk of the Kane County Circuit Court, commanding him to receive and file Risk's bond as sheriff-elect and to administer to Risk the oaths of office. The court granted the writ, saying: "We are of the opinion that the filing of the bond of the sheriff and administering the oaths of office is merely a ministerial duty. The clerk had no right to take upon himself to judge as to the qualifications of the sheriff, or to determine what will be the effect of his performing his duty. He must perform what the statute has required of him, without regard to consequences."

In *C., B. & Q. Ry. Co. v. Wilson*, *supra*, appellant being authorized by its charter to construct and to operate a railroad, applied to appellee as circuit judge for the appointment of commissioners to condemn lands. He denied the application. Upon appeal the Supreme Court awarded a peremptory *mandamus*, saying, among other things: "Here the act to be performed by the circuit judge is

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strictly of a ministerial character, and it was so determined by this court in the case of the Illinois Central Railroad Company v. Rucker, 14 Ill., 153, where a *mandamus* in precisely such a case was awarded by this court. When such a case is made as is required by the statute, the judge has no discretion whether he will appoint commissioners or not. It is his imperative duty to do so. Necessarily he must look to see whether such a case is presented as authorizes and requires him to act, and such is the case with every officer who is called upon to discharge a ministerial duty." C., B. & Q. Ry. Co. v. Wilson, 17 Ill., 128-9. See, also, People v. Hastings, 6 Ill. App., 436; Hickey v. C. & W. Ry. Co., 6 Ill. App., 172; Foss v. Chicago, 56 Ill., 354; Bibel v. People, 67 Ill., 172.

To sustain the action of the mayor in this regard appellants cite many cases from the reports in other States. (among which are Haggart v. Stehlin, 137 Ind. 43; Leighton v. Maury, 76 Va. 865; Sherlock v. Stuart, 96 Mich., 193; Muller v. Com'rs, 89 N. C., 171; State v. Cheyenne, 40 L. R. A. 710; Perry v. Salt Lake, 7 Utah, 143), and one case in this court (Swift v. People, 63 Ill. App., 455). The case from sister States, though persuasive, cannot be followed, nor can we follow the law as laid down in the Swift case, *supra*, for the reasons hereinafter given.

Under the admitted facts of this case the pivotal question is: had the mayor of the city of Chicago any discretion to refuse to issue the license demanded by the relator?

By chapter 24, R. S., Hurd 1903, the subject of the licensing of dram-shops, within its corporate limits, is delegated to the city of Chicago. In pursuance of that power the common council passed an ordinance governing this subject. This ordinance states that the "mayor of the city of Chicago shall from time to time grant licenses for the keeping of dram-shops within the city of Chicago to persons who shall apply to him in writing therefor." It also provides that the party applying for such a license shall furnish evidence satisfactory to the mayor of his good character;

and sets out what other steps the applicant must take in order to put himself in position to demand the same.

It is admitted that in making his application the relator did everything required of him by the laws and ordinances; that no question was or is made as to the sufficiency of the bonds tendered by him, or as to his good character; and that his application was refused solely because the place where he proposed to keep his dram-shop is immediately next to the grounds of one of the public schools of the city.

We are of the opinion that under the decisions of our Supreme Court upon the admitted facts of this case, the mayor had no discretion to refuse to issue the license as demanded. The Legislature has delegated to the city of Chicago the power to control the keeping of dram-shops within its limits. The city by ordinance has exercised that power. The ordinance fully determines to whom and under what circumstances licenses shall be granted and leaves to the mayor no discretion as to the location of the proposed saloon. When the applicant has complied with the laws and ordinances, and the mayor is satisfied that he is a man of good character and the bonds he tenders are sufficient, the mayor becomes a mere ministerial officer, and it is his duty to issue the license upon proper request.

Our government is one of law. Our rights and our liberties are conserved by general rules acting upon each and all alike. All laws and ordinances must be general in their operation, and must grant equal rights to every inhabitant of the State or city. Privileges thus granted must be extended to every one upon the same terms, conditions and restrictions. *Chicago v. Rumpff*, 45 Ill., 90; *Millett v. People*, 117 Ill., 294; *McGregor v. Village of Lovington*, 48 Ill. App., 208; *Swigert v. People*, 50 Ill. App., 187.

Where the Supreme Court has declared what the law is upon any point, it is our duty to follow that decision in like cases. *Field v. People*, 2 Scam., 79.

In *Zanone v. Mound City*, 103 Ill., 552, the question here at issue came up to the Supreme Court upon demurrer to a petition for a writ of *mandamus* against the municipal

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authorities of Mound City to compel them to issue to the relator a license to keep a dram-shop within the corporate limits of the city. The petition alleged full compliance by the relator with all the conditions and requirements of the city ordinance providing for the issue of licenses to keep dram-shops within the city, and averred that he was in every respect a suitable person to be licensed to carry on such business, and had tendered the license fees fixed by the ordinance and a good and sufficient bond as required by the act, and yet the respondents had refused to issue such license, and this without excuse, justification or explanation. All these things were admitted by the demurrer. The writ was ordered to be issued. That case and the one at bar are on all fours, except in one particular, namely, that here the defendants say that the mayor refused to issue the license because the place where appellee proposed to keep his dram-shop is immediately next the grounds of one of the public schools of the city. This difference is immaterial, for the reason that the ordinance of the city of Chicago concerning dram-shops does not refer to the place where the dram-shop shall be situate, other than to say that it must be within the city limits, nor does it confer upon the mayor any power to determine that the place selected is a suitable place for the location of a dram-shop. The Supreme Court, among other things, said: “* * * Such ordinances must be general in their character, and operate equally upon all persons within the municipality of the class to which the ordinance relates. * * * Whether a license be that of a merchant, a peddler, or a keeper of a dram-shop, it confers a privilege upon the citizen for which the law requires a fixed compensation to be paid, and the privilege must be open alike to all citizens of the municipality in and on like conditions. * * * The case of *East St. Louis v. Wider*, 46 Ill., 351, decides, expressly, that *mandamus* is the proper remedy where an applicant has brought himself within the provisions of such an ordinance, and the municipal authorities refuse the license. * * * The doctrine that any one who has brought himself within the requirements regu-

lating the licensing power may compel, by *mandamus*, the corporate authorities to grant him a license where it is refused through mere caprice, is recognized, either expressly or by necessary implication, in all the cases bearing upon this subject to which our attention has been called. * * * Equality before the law is a fundamental principle of our institutions, and no reason is perceived why applicants for license to keep a dram-shop, who are suitable persons to be licensed, should stand on an equality before the law. * * * Being of the opinion that the record shows a clear right in the relator, the peremptory writ sought by the petition is ordered to be issued." It is true that two of the seven judges dissented from this opinion, and one of them refused to concur therein, but that opinion stands as the judgment of our Supreme Court upon the question at bar.

If the citizens of Chicago desire to prevent the licensing of dram-shops to be kept in the immediate vicinity of schools, or of churches, or in strictly residence neighborhoods, they must prevail upon the common council to pass an amendment to the present ordinance, which amendment shall give to the mayor a discretion as to the *place* where a dram-shop may be located.

It follows from what has been said that the refusal of the mayor to issue this license was an act beyond his power, and therefore the judgment of the trial court must be and it is affirmed.

Affirmed.

Cicero & Proviso Street Railway Company v. Allen V. Hughes, by next friend.

Gen. No. 12,124.

1. VERDICT—*when set aside as against preponderance of evidence.* Where the Appellate Court from a careful examination of all the testimony is convinced that the verdict is clearly and manifestly against the weight of the evidence, it will set aside such verdict and reverse the judgment.

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2. PEREMPTORY INSTRUCTION—*when denial of motion for, proper, notwithstanding verdict if rendered against the party making such motion would be against the preponderance of the evidence.* The denial of a motion for a peremptory instruction is proper notwithstanding a verdict if rendered would be against the preponderance of the evidence and would therefore have to be set aside upon a motion by the party so asking for a peremptory instruction.

Action on the case for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1904. Reversed and remanded. Opinion filed December 4, 1905.

JOHN A. ROSE, ALBERT M. CROSS, and HENRY W. BRANT, for appellant; W. W. GURLEY, of counsel.

JOHN F. WATERS and C. HELMER JOHNSON, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

Appellant operated a single track electric street railway in St. Charles avenue, an east and west highway in the village of Maywood, Illinois. This track when it reaches 19th avenue, a north and south paved street in the same village, turns by a curve to the south until it unites with and ends in a single track, also operated by appellant, lying in the last named avenue. A car going west in St. Charles avenue is run around the curve and is stopped when it has cleared the curve and is wholly on the 19th avenue track. The power is then reversed and the car is run north two short blocks to a depot which is the end of the line. The power is then again reversed, and the car proceeds south along a straight track, crossing the curve at St. Charles avenue, to Madison street, where it turns east and goes on into the city of Chicago. The west wheels of the south-bound car do not touch either rail of the curve, but its east wheels cross both of said rails. It is the custom of the motorman going south to slow down to one-half speed in approaching and in passing over this curve.

The plaintiff below recovered a judgment for \$4,500 against appellant for injuries he sustained at this curve May 19, 1898, by reason of the alleged negligence of appellant,

the defendant below, while the plaintiff, as it is alleged, was a passenger upon one of the defendant's south-bound cars. At the time of the accident the plaintiff was eight years old and small of his age, but was a bright, active boy. It appears that the boy and his grandmother took an east-bound car at 15th avenue and St. Charles avenue and rode west to 19th avenue and from there north to the end of the line. The grandmother was on her way to her home in the city of Chicago, and it is claimed that the boy was going with her to stay over night. The car was an open one, having a foot-board on each side, a center aisle, and short seats facing each other on each side of the aisle.

The grandmother, a woman aged 78 years, testified that she took a seat on the north side of the car and the boy sat in front of her; that the car passed west and north to the depot, and then started south; that she sat facing south with the boy sitting opposite her, his feet not reaching to the floor; that when the car reached this intersection or curve, "it gave a sudden jerk, whatever was the cause of the jerk I can't tell you, because I would not tell a story. When the car gave this jerk it was given so quick I can't tell you what happened to the boy. He fell just like he flew. The jerk threw him out. That is my opinion about it;" that the "car was going straight south when this jerk came, and it picked him up and threw him out from the end of the seat into the street just like he flew. The first thing he struck after he left the seat was the street. He did not fall down on the floor of the car; it simply lifted him up out of the seat and landed him into the street;" that a man (the witness Twining) said he would take the boy home, and, as the two walked away, she went on in the car; that the boy had never before gone to her home except when accompanied by either his father or his mother; and that twice before the boy had gone with her to the end of the road—"He would simply ride up to the depot and get off and stay off and would go home."

The boy testifies that he got on the car with his grandmother at 15th avenue and sat opposite to her in the center

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of the seat, not holding to either end of the seat, and that he did not change his position until he was thrown off the car. That the car left the station and proceeded south, and "As they went to go over the switch I went off. When the car jerked I fell off and hit the ground and slid a little ways. The car at that time was going about the ordinary rate of speed." That he was thrown off right at the switch. That when the car reached the switch it suddenly started up. "It was both the sudden starting and the wheel going over the switch that threw me off. The wheel on the west side of the car don't go over the switch because there is no switch there. The car started forward with a jerk and then it kind of bumped, the whole car bumped. It did not throw my grandmother out. It did not throw me over against her. The first thing I struck was the pavement. Like a boy would throw a ball, I bounded out of the seat in a north-westerly direction and landed on the pavement,—I fell out of the west side. * * * I never stood on the foot-board at all."

W. L. Twining, a witness called by defendant, testified that he had charge of the office of the Proviso Land Association, which office stood on the northwest corner of St. Charles and 19th avenues. That at the time of the accident he was standing at the water fountain near the office, about 20 feet from the roadway looking north at the coming car. That "At a point about 200 feet from St. Charles avenue, on the west side of the car, hanging to the side rails, that is, the uprights of the car, was this boy, and every few feet he would hang on that way and put his foot down to see how fast the car was going, as though he was going to get off, and run a little ways and jump on again. He continued doing so until he got to the line of the south sidewalk of St. Charles avenue, when he jumped off the car backwards, rolled over nearly to the sidewalk—rolled over about twice, I should judge, and began to scream. I promptly ran out, picked the boy up, and asked him if he was hurt." That witness first carried the boy into the office and then led him home. That the car "was running at a fair rate of speed

until it got within the width of the street from the switch, when it slacked up to cross the switch, and when the boy jumped off the car was going at a very slow rate of speed. * * * I didn't notice that there was a sudden starting and jerking of the car at the time the boy stepped off or fell off. I had seen this boy about these cars before this time numberless times. I have sent him home a good many times for jumping on the cars, and spanked him once for jumping and riding on the cars—flipping cars at that corner and riding down to the depot and back.” That at the time of the trial the witness was manager of the Proviso Land Association and had about 150 men working under him.

Thomas G. Rhodes, a travelling salesman and a passenger on this car, testified: “This boy that fell off the car at the end of the line was on the car and on the railing, that is, on the foot-board of the car, talking to an old lady there. An old lady was sitting in one of the seats and the boy was on the outside rail hanging on the outside rail—that is, the little railing of the seat, and talking to the old lady. As the car came down to St. Charles road they slacked up to cross over on that crossing. I did not see the boy as he stepped off the car. When I next noticed him after he was off the car he was right on the ground alongside the car. There was nothing unusual about the movements of the car as it came down the street to the south side of St. Charles street. There was nothing in the car that jarred or shook me out of the seat. I noticed the boy all the way down. * * * He was standing right on the board at the end of the seat. I didn't notice him inside the car.”

The affidavit of C. I. Barker, an agent of the defendant, was read, to the effect that if W. G. James, who was conductor on the car at the time and place of the alleged accident, were present, he would testify that “As his car was going south on 19th street he noticed the plaintiff standing on the foot-board of the car near an aged lady; that he was not seated in a seat in the car at the time of the accident or at any time shortly prior thereto, but was standing on the

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foot-board; that when the car reached a point near St. Charles street the plaintiff jumped from the moving car to the ground and fell and hurt himself; that at the time he jumped from the car said car was going at a slow rate of speed and was running smoothly; that there was no sudden jerking of the car as the same passed over the switch at the intersection of 16th street and 19th street, and that said plaintiff was not thrown out of the car, but jumped from the foot-board to the ground while the car was in motion; that plaintiff had not paid his fare as a passenger and had not taken his seat within the car as a passenger."

H. B. Sherman, the motorman on the car, testified: "I noticed the boy while the car was standing at the depot, and he was around the car, on the running-board and on the car. I didn't notice him after the car started south. As the car came down to St. Charles street and crossed the switch it was running four or five miles an hour. There was no jerking. * * * I didn't see him fall. The last I noticed of him was just about the time the car started. * * * I couldn't say how many times I have seen the boy around the depot and along the tracks there before the accident. I have seen him several times. * * * We always slow down at that switch when we are going south so as to go over the switch slow. I couldn't say that it was rougher there than it is on a smooth track. It is always the company's rule to slow up going over a switch. There is a little unevenness of course in any switch. I suppose there was at this time."

Dr. W. F. Scott, a witness for the plaintiff, testified that he was called to care for the plaintiff, and he went on to describe the injury to the boy's left arm and his treatment of the same. Dr. Scott was afterwards called by the defendant, and then testified: "During the time I treated this boy I had some conversation with him. He told me how this accident happened. He said he got on the street car to ride a piece with his mother, with his grandmother; that she was going away on the car, and that he intended to jump off, which he said he did, and that was the way he had

broken his arm; that he fell in jumping from the car. That was during the time I treated him." On cross-examination the witness admitted that his bill had not been paid, and that he felt he had not been treated right about it by plaintiff's father. He further said: "I am not the doctor for the defendant company and never was. * * * I don't remember how long this conversation was after the accident. I think it was during the first examination, because we usually try to get at the exact manner that the patient falls, as it gives us some idea of the kind of injury that we may expect. I don't remember exactly when it occurred."

The control of an appellate tribunal over a verdict which is manifestly against the weight of the evidence is undoubted. This rule was announced in *Lowry v. Orr*, 1 Gilm., 70, and was followed by our Supreme Court so long as it passed upon the facts of cases coming before it. See *Chase v. Debolt*, 2 Gilm., 371; *Koester v. Esslinger*, 44 Ill., 476; *I. C. Ry. Co. v. Alexander*, 46 Ill., 505; *Haycraft v. Davis*, 49 Ill., 455; *C. R. I. & P. Ry. Co. v. Gregory*, 58 Ill., 272; *Peaslee v. Glass*, 61 Ill., 94; *Lincoln v. Stowell*, 62 Ill., 84; *C. B. & Q. Ry. Co. v. Stumps*, 69 Ill., 409; *Reynolds v. Lambert*, 69 Ill. 495.

The Supreme Court since the organization of this court has further declared that it is the duty of this court to consider the testimony in the case, and if we find that the verdict and judgment are not supported by it, or are clearly against the weight of the evidence, it is then our duty to set aside such verdict and to reverse such judgment, and that a performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners in all those classes of cases where the judgments of this court are final and conclusive upon all questions of fact. *C. & A. Ry. Co. v. Heinrich*, 157 Ill., 388; *C. & E. Ry. Co. v. Meech*, 163 Ill., 308; *Gall v. Beckstein*, 173 Ill., 189.

This court has applied the same rule in many cases, among which are: *Dinet v. Reilly*, 2 Ill. App., 316; *Bernstein v. Patterson*, 33 Ill. App., 152; *C. C. Ry. Co. v. Delcourt*, 33 Ill. App., 432; *Goss & Phillips Mfg. Co. v. Suelau*, 35

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Ill. App., 103; C. & E. I. Ry. Co. v. Gill, 37 Ill. App., 61; C. W. D. Ry. Co. v. Conley, 43 Ill. App., 347; N. C. St. Ry. Co. v. Lotz, 44 Ill. App., 78; Welch v. Huckins, 45 Ill. App., 53; N. C. St. Ry. Co. v. Fitzgibbons, 54 Ill. App., 385; I. C. Ry. Co. v. Kennicott, 68 Ill. App., 90; Elguth v. Grueszka, 75 Ill. App., 281; Jefferson Ice Co. v. Zwicokoski, 78 Ill. App., 646; W. C. St. Ry. Co. v. Lieserowitz, 98 Ill. App., 591; Johnston v. Sochurek, 104 Ill. App. 352.

The conclusion to be drawn from all these cases is, that when this court, from a careful examination of all the testimony, is convinced that the verdict is clearly and manifestly against the weight of the evidence, it becomes our duty to set aside such verdict, and to reverse the judgment entered thereon.

In the case at bar the somewhat improbable statements of the plaintiff and of his grandmother as to the way in which this accident happened are contradicted by the evidence of two employees of the defendant and also by three intelligent disinterested and unimpeached witnesses.

It is not necessary to restate the testimony. It is sufficient for us to say that the great preponderance of the evidence is against the contentions of the plaintiff, and is in favor of those of the defendant.

At the close of the plaintiff's case and again at the conclusion of all the evidence, the defendant moved the court to instruct the jury to find the defendant not guilty. The court denied the motion. This was not error. There was evidence before the jury which, if believed, fairly tended to establish the plaintiff's cause of action. In such case the law is well settled that the facts must be submitted to the jury. *Woodman v. Ill. T. & S. Bk.*, 211 Ill., 578.

The judgment of the Superior Court is reversed and the cause is remanded.

Reversed and remanded.

Chicago Union Traction Company, et al., v. Leo Lowenrosen.**Gen. No. 12,129.**

1. **PASSENGER**—*what does not show non-status as.* The fact that a plaintiff claiming that he was a passenger made statements upon cross-examination which tended to show that he was not a passenger, does not establish his non-status as a passenger where there was ample evidence in the case without such statement to establish that he was in fact a passenger.

2. **RECOVERY**—*upon what, must be predicated.* The plaintiff must recover, if at all, upon his declaration; he cannot charge one species of negligence and recover upon proof of negligence of a different character.

3. **RES GESTÆ**—*what not part of.* A statement made by a companion of one claiming to have been a passenger upon a traction car after such car had traveled about a block, is not a part of the *res gestæ* but is only competent as tending to discredit the testimony of such companion.

4. **TECHNICAL ERRORS**—*when will not reverse.* Technical errors are not ground for the reversal of a judgment which in the opinion of the Appellate Court does substantial justice between the parties.

5. **VERDICT**—*when not excessive.* A verdict for \$5,000 is not excessive where the evidence shows that the plaintiff was thrown from the car in question to the ground with such violence that he was rendered unconscious; that blood flowed from his eyes and mouth; that he was transformed thereby from a strong, well man in the prime of life, of good hearing and unruptured, to a sick man, prematurely old, incapacitated for pleasure, wholly deaf in one ear and partially deaf in the other, with an inguinal hernia so large that it necessarily interferes with his movements and cannot be reduced by manipulation.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905.

Statement by the Court. Appellee recovered a judgment for \$5,000 against appellants in an action on the case for personal injuries. The accident happened on West

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Madison street, an east and west highway, near a cross street known as Hamlin avenue, in the city of Chicago. The West Chicago Street Railway Company at the time of the accident owned a double track street railway lying in Madison street, which was then and there operated by the Chicago Union Traction Company.

The first and third counts of the declaration alleged that appellee was a passenger, the second and fourth that he was in the act of stepping on the car for the purpose of becoming a passenger, when the accident happened. The negligence charged is in the management and control of the car, in causing the car to start and lurch violently forward, and in causing the car to start forward while the plaintiff was in the act of stepping into the car.

The evidence of the plaintiff tended to prove that August 17, 1901, he left his home on Lake street and walked south to Madison street and Hamlin avenue, accompanied by his wife, his young daughter, his married daughter and her child, a babe in arms; that the married daughter was going to her home several miles east of Hamlin avenue; that she intended to take an east-bound Madison street car, and when Sangamon street was reached to transfer to a south-bound car; that the plaintiff was going east with his married daughter to attend a society meeting in a hall situate on the corner of Jefferson and Maxwell streets; that the mother and young girl, after seeing the others on the car, intended to go to a grocery store and from there to return to their home; that the time was about 8:30 P. M.; that the entire party crossed Madison street and stood on the south side of that street at the intersection of Hamlin avenue awaiting the coming of an east-bound car. That when the train came it consisted of a grip-car and two trailers, each of which was an open car with running boards at the sides and seats crosswise of the car, separated by a central aisle; that the mother and the young girl remained on or near the south sidewalk, while the married daughter and the plaintiff, he carrying the babe, stepped out to the rear car as the train stopped to discharge and to take on passen-

gers; that his daughter stepped into the car between the middle seats and the plaintiff, with the babe in his left arm, took hold of some part of the car with his right hand and stepped up on the running board and was in the act of handing the babe to its mother when the car started suddenly and thereby he was thrown to the ground and injured; that the plaintiff was then 43 years old, a strong, vigorous man, free from rupture and not deaf; that he was rendered unconscious by the fall, and was conveyed to his home in the police ambulance, where he was confined to his bed from four to seven weeks; that within a few days a rupture to the scrotum developed, which at the time of the trial was as large as a cocoanut; that he became almost wholly deaf in the right ear and in the left ear there was a loss of 25 per cent. of what the hearing should be; that the condition of the right ear is permanent, and the rupture cannot be cured without the performance of a major operation which might or might not effect a permanent cure; that he is not able to do continuous work and is prematurely old.

The evidence of the defendants tends to prove that appellee did not intend to become a passenger upon the car, but went to the car for the sole purpose of seeing his daughter and grandchild safely on it; that appellee and his daughter got into the car and reached the center aisle before the conductor of the rear car rang the bell and the car started slowly; that appellee jumped off the car after it started, and in so doing fell into the street; that the hernia was not produced by the fall, and that it could be cured by a major operation.

JOHN A. ROSE, ALBERT M. CROSS, and HENRY W. BRANT, for appellants; W. W. GURLEY, of counsel.

I. B. LIPSON, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

The contentions of appellants are: First, the court erred in refusing the peremptory instruction requested by the defendants; second, the court erred in giving plaintiff's first

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and second instructions; and third, the damages are excessive.

The peremptory instruction is based upon the pleadings and the evidence. The declaration charged that the plaintiff was a passenger on said car, or was in the act of stepping on said car for the purpose of becoming a passenger. It is contended that the evidence showed he did not intend to become a passenger, but, at the time of the accident, had gone to the corner in question simply to put his daughter on the car, and was injured while handing her baby to her.

It is settled law that the plaintiff must recover, if at all, upon his declaration, and that he cannot charge one species of negligence and recover upon proof of negligence of a different character. *C. & A. Ry. Co. v. Bell*, 209 Ill., 25.

If the plaintiff was not a passenger, or did not intend to become a passenger, defendants did not owe him that high degree of care required from the common carrier for the protection of its passengers, but owed him the duty of ordinary care only; namely, to use ordinary care that the plaintiff was not injured by reason of the sudden starting of the car, or by reason of an omission to give the customary signals for the starting of the car.

The claim that the plaintiff was not a passenger is based upon a statement made by him in cross-examination. In his examination in chief he had testified that he was going to attend a meeting of the Western Star Order, of which he was recording secretary, at Broder's Hall. The following occurred in his cross-examination:

"Q. Isn't it a fact that you just simply went down there to help your daughter get on the car and get started home that night?

A. Yes.

MR. LIPSON: What is the answer?

THE COURT: Yes.

MR. LIPSON: I ask that the court put that question to the witness.

MR. BAILY: No, I object to it.

JUDGE NEELY: I object to it. The witness answered.
THE COURT: You can get him on the re-direct."

At the close of the cross-examination the court asked the plaintiff: "When you put your baby, your grandchild, into your daughter's arms, did you intend to take that car?"

A. "Yes, I was ready to go on the car. I was going to the meeting on that car, and my daughter was going to get off when she got to her home."

There is ample evidence in this record to justify the jury in finding that the plaintiff was a passenger in this car or was in the act of stepping on the car for the purpose of becoming a passenger at the time of the injury.

The conductor testified that after the car had run about a block he went to the daughter and collected her fare, and then looked around for the plaintiff, when she said, "The gentleman jumped off," or "He jumped off." This evidence is not *res gestæ*, nor was the statement made in the presence of the plaintiff. Its effect is to discredit the daughter, but it cannot be extended farther.

The plaintiff testifies: "When Mrs. Brooks got on the car was standing still. She took the baby from me. I held the baby on that hand, and I held with that hand to the car, and I was ready to go on the car from the first step and the car push and I fall down."

Mrs. Brooks says: "The car jerked and he fell back. He fell backwards and his head was west. I had the baby when he fell. The car jerked and I was on the car screaming."

Harry B. Gimlin testified: "He also had a little child and he was putting his foot on the place for him to get into the car, and as he was there the grip started all of a sudden, the lever opened, and threw him."

Opposed to this is the testimony of the two conductors and the motorman of this train, each of whom testifies that when they left Hamlin avenue the train started up in the usual way. It is to be noted that each of these witnesses declares he knew nothing of this accident until he reached the car

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barns upon the return trip. It is not strange that in this regard the jury believed the evidence of the plaintiff and disbelieved that of the defendants.

The first instruction given at the request of the plaintiff reads as follows:

“1. If you believe from the evidence that the plaintiff got on the car in question for the purpose of riding on the said car and was ready, willing and able to pay his fare, then it was the duty of the defendant, Chicago Union Traction Company, to do all that human care, vigilance and foresight could reasonably do consistent with the character and mode of conveyance adopted and the practical prosecution of their business to prevent an accident to the plaintiff while he was riding upon the said car or going upon the same, and if you further believe from the evidence that the defendant, Chicago Union Traction Company, failed to use such care and diligence and that by reason thereof the plaintiff was injured as alleged in the plaintiff's declaration while the plaintiff was in the exercise of reasonable care for his own safety, then you should find the defendant, Chicago Union Traction Company, guilty.”

In objecting to this instruction the defendants say it assumes that the plaintiff was a passenger or intended to become a passenger upon the car. As we have seen, there was ample evidence to justify the jury in so finding.

Again, they say it does not limit the right of recovery to the negligence charged in the declaration. We do not so read the instruction. It says, if the “defendant the Chicago Union Traction Company failed to use such care and diligence, and that by reason thereof the plaintiff was injured as alleged in the plaintiff's declaration,” etc. The phrase “as alleged in the plaintiff's declaration” relates back to the use of diligence by that defendant as well as to the injury to the plaintiff. Any other interpretation is too technical for practical use. Further, by given instruction No. 11 the jury were instructed that unless the plaintiff was a passenger on the car, or was in the act of boarding or of stepping on the car for the purpose of becoming a passenger, he could

not recover. But admitting that this instruction is not clearly drawn, the propositions of law it contains are correct when applied to the facts of the case as found by the jury, and they were not misled thereby. From a careful examination of the record, we are convinced that in this case substantial justice has been done, and that a retrial would probably result in another verdict for the plaintiff. So believing, we cannot set aside the judgment for errors of a technical character which do not go to the substantial merits of the case. This common sense position is sustained by *Wilson v. The People*, 94 Ill., 299; *C. & E. I. Ry. Co. v. Rung*, 104 Ill., 641; *Zimm v. The People*, 111 Ill., 52; *Beard v. Maxwell*, 113 Ill., 442; *Gore v. The People*, 162 Ill., 259; and *W. C. St. Ry. Co. v. Maday*, 188 Ill., 310.

We find no reversible error in the second instruction given at the request of the plaintiff.

The question of the amount of damages in an injury case is primarily for the jury under the guidance of proper instructions. The evidence in this case justifies the statement that the plaintiff was thrown from the car to the ground with such violence that he was rendered unconscious, and blood flowed from his ears and mouth, and that he was transformed thereby from a strong, well man in the prime of life, of good hearing and unruptured, to a sick man, prematurely old, incapacitated for pleasure, wholly deaf in one ear and partially deaf in the other, with an inguinal hernia so large that it necessarily interferes with his movements, and cannot be reduced by manipulation. It is true that there is evidence given by distinguished experts to the effect that this hernia could not come from the accident. There is also abundant evidence to the contrary. Two witnesses testify that while the plaintiff lay upon the ground at the scene of the accident, partially unconscious, he drew up his legs and placed his hands upon his groin. Doctor Leviton, who examined the plaintiff within three days of the injury, found this hernia by digital examination, and advised the immediate use of a truss. Doctors Weber, Stettauer and Campbell, men of high rank in their profession, in answer to a

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hypothetical question based upon the evidence, each stated that the fall from the car could have produced the hernia. The objection that the damages are excessive is not well taken.

Finding no reversible error in this record, we affirm the judgment of the Circuit Court.

Affirmed.

Joseph H. Strong, Administrator, v. Wesley Hospital.

Gen. No. 12,477.

1. INJUNCTION—*what violation of, entered to restrain collection of judgment.* Where one is enjoined from "collecting or attempting to collect" a judgment and also from "enforcing the execution under said judgment," it is a violation of the spirit and intent of that order to bring suit against the surety upon a bond given in an effort to appeal from that judgment.

Bill for injunction, etc. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed December 4, 1905.

CANNON & POAGE, for appellant.

HORTON & BROWN, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

July 1, 1905, upon a bill filed by appellee, Judge Tuley of the Circuit Court entered an interlocutory order restraining appellant from suing James B. Hobbs upon a certain appeal bond.

It appears that in November, 1904, a judgment in the sum of \$2,000 was entered before Judge Honore of the Circuit Court in an action at law there pending against appellee and in favor of appellant as administrator of one Lizzie Kolar, deceased. Upon the entry of the judgment appellee prayed an appeal to this court, which was allowed upon condition that appellee file a bond in the sum of \$3,000 in 30 days from November 19, 1904, and present to the

court a bill of exceptions within 60 days from the same date. The minute clerk then sitting before Judge Honore was then and there directed by the Judge to enter said orders, but said clerk did not enter in his minute book nor did he write up any of the orders in the cause after the entry of the judgment. That appellee within 30 days after November 19, 1904, filed an approved appeal bond in said cause, and within the time allotted presented a bill of exceptions therein, which was assented to by the attorneys of appellant, was signed by Judge Honore and was then filed with the clerk of said court. That not until February 18, 1905, when appellee ordered a transcript of record in the suit at law, did it discover that said orders had not been written up; and not until ten days later, when counsel for both parties appeared before Judge Honore, did it know that the minute clerk had not entered said orders in his minute book. That appellee then moved to have such omitted orders entered *nunc pro, tunc* as of November 19, 1904, but the court on March 6, 1905, denied said motion, to which appellee excepted and saved its bill of exceptions and prayed an appeal, which was allowed on bond of \$250 being filed.

March 29, 1905, appellee filed its bill, setting up the foregoing facts, alleging that it had a good defense to the suit at law, praying for a decree directing the clerk of said court to amend the record in the said law case, for general relief, and for an injunction restraining all proceedings in the original suit until the matters involved could be determined.

Appellant filed its answer to said bill, excepting to it for want of equity, for multifariousness, and because appellee had a complete remedy at law; and admitted the facts substantially as set forth therein; adding thereto the fact that the motion of February 28, 1905, was renewed March 6, 1905, and was again overruled and an appeal prayed by appellee; and claiming that the questions of amendment and whether appellee had a good defense to the suit at law were *res judicata*; and praying the advantage of demurrer on the

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grounds that appellee had an adequate remedy at law, and the lack of equity on the face of the bill.

After the denial of the motion to amend the record made February 28, 1905, and renewed and again denied March 6, 1905, and on March 29, 1905, the original bill was filed in this case. May 8, 1905, Judge Mack of said Circuit Court granted an injunction upon said bill restraining appellant "from collecting or attempting to collect" said judgment and "from enforcing the execution under said judgment."

June 5, 1905, Judge Tuley entered an order upon appellee to file a new bond in the sum of \$4,100, which order was complied with on the following day.

June 19, 1905, a motion by appellant to dissolve the injunction then pending was denied by Judge Tuley.

July 1, 1905, by leave of court appellee filed a supplemental bill, and thereupon Judge Tuley enjoined appellant from suing upon the \$3,000 appeal bond and from suing James B. Hobbs, the surety in said bond, on account of the matters involved in this suit.

July 25, 1905, appellant appeared before Judge Windes of said Circuit Court, and moved to dissolve said injunction, relying upon the original and supplemental bill, the answer of appellant thereto, and the affidavits of Thomas H. Cannon, John B. Heinemann and Wm. J. McKenna. After argument for each of the parties thereto, Judge Windes refused to hear the motion.

July 26, 1905, the Clerk of said Circuit Court approved an appeal bond from the order of July 1, 1905, which in terms extended the injunction to restrain suit against the bondsman, James B. Hobbs.

The sole question before us is as to the propriety of the order of July 1, 1905, extending the injunction so as to prevent suit upon the \$3,000 appeal bond.

We are of the opinion that the injunction as originally entered covered and included the surety. Where one is enjoined from "collecting or attempting to collect" a judgment, and also from "enforcing the execution under said judgment," it is a violation of the spirit and intent of that order

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to bring suit against the surety upon a bond given in an effort to appeal from that judgment.

No appeal was prayed from the order entered May 8, 1905, nor from the order of June 19, 1905, denying the motion to dissolve that injunction. If we should set aside the order of July 1, 1905, appellant would still be enjoined and Hobbs would still be protected by the injunctive order of an earlier date. Why should we do a useless thing?

As the original bill is not before us, we refrain from any comment upon it.

The decree of the Circuit Court is affirmed.

Affirmed.

Chicago Union Traction Company v. George W. Brethauer.

Gen. No. 12,116.

1. **LOSS OF PROFITS**—*what competent in proof of, in action of trespass for unlawful ejection.* In such case it is proper, where the declaration sufficiently avers special damages, to show that the plaintiff was a jeweler and that his profits during the months of the year preceding the accident were of certain specific sums and that during the months following the accident were of certain other specific sums less than before the accident.

2. **RES GESTÆ**—*what part of.* Conversations between the plaintiff suing for damages for alleged unlawful ejection from a traction car and the conductor which tend to show whether the plaintiff was upon the car in good faith claiming to be a passenger or whether he was there "looking for trouble," are competent and form a part of the *res gestæ*.

3. **PASSENGER**—*when ejection of, unlawful.* The ejection of one riding upon a traction car and asserting his right so to ride by virtue of a transfer, is unlawful, where such right exists by virtue of a valid ordinance, notwithstanding such ordinance at the time of such ejection is in dispute and is being made the subject of test litigation.

4. **PASSENGER**—*rights of, upon unlawful ejection.* A passenger who is about unlawfully to be ejected from a traction car cannot resist, but must either pay his fare or peaceably leave the car, but he may recover damages for the indignity suffered in so being re-

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quired to leave the car, and likewise for any unnecessary force that may be used in his ejection.

5. **TRESPASS**—*lies for unlawful ejection of passenger by agent of corporation acting under instructions.* Trespass is the appropriate form of action where the action is instituted for the unlawful ejection of a passenger whose ejection is by an agent of the defendant traction company acting pursuant to orders received from his principal.

6. **VERDICT**—*when not excessive.* A verdict of \$10,000 held not excessive in an action for unlawful ejection to a passenger where it appears that by reason of such unlawful ejection the plaintiff suffered permanent injuries to his mind and body, that his memory, his nerves of motion, his voice, his hearing and his eye-sight became permanently affected and his earning power largely decreased.

Action of trespass for unlawful ejection. Appeal from the Superior Court of Cook County; the Hon. ROBERT W. WRIGHT, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905.

Statement by the Court. The appellee secured a judgment of \$10,000 against the appellant in June, 1904, in the Superior Court of Cook county, on the verdict of a jury. From this the appellant has prosecuted this appeal, and has assigned as error and argued that the judgment and verdict were against the law and the weight of the evidence; that the case should have been withdrawn from the jury by a peremptory instruction to find for the defendant; that there are variances between the proof and the declaration, calling for a reversal of the judgment; that an instruction especially framed with reference to such alleged variance, that should have been given, was refused; that evidence was improperly admitted and evidence improperly excluded, and, finally, that the damages allowed are not only excessive, but so grossly excessive as to be indicative of passion and prejudice on the part of the jury, and to taint the whole verdict beyond the possibility of a cure by *remittitur*.

The suit was brought by appellee for damages for being wrongfully ejected from the cars of appellant company, and by the means used in such ejection physically injured. The declaration originally contained seventeen counts, but the

plaintiff (the appellee here) abandoned seven of them, and they were stricken out. Those retained were originally numbered 1, 3, 4, 6, 7, 8, 9, 10, 14 and 17. The first charges that the plaintiff became a passenger on one of the defendant's Lincoln avenue cars going northwesterly January 12, 1902; that he paid to the conductor of the Lincoln avenue car the fare of five cents and asked for a transfer ticket to enable him to be carried in a northerly direction on a Halsted street car of the defendant; that the conductor gave plaintiff a transfer ticket; that plaintiff left the Lincoln avenue car at Halsted street and entered the next Halsted street car going north; that while the Halsted street car was running at a high rate of speed, its conductor demanded of the plaintiff a fare; that plaintiff gave the conductor the transfer tickets he had received in the Lincoln avenue car; that the conductor received them but refused to accept them in payment of the fare, and demanded that plaintiff should pay a fare in money; that the plaintiff explained to the conductor the circumstances under which he received the transfer tickets, and remonstrated with him against the demand for cash fares; that thereupon the said conductor assaulted the plaintiff and "with great, unnecessary and unreasonable force and violence" dragged the plaintiff through and out of the car, and ejected him while the same was moving at a high rate of speed, and thereby threw the plaintiff on the ground, to his great physical injury, etc., and also with the result that he was hindered and prevented from transacting and attending to his affairs, "and lost and was deprived of divers great gains, profits and advantages, etc., and from carrying on his business as a jeweler, from which employment and business the plaintiff derived an income and profit of five thousand dollars a year," and was permanently disabled, etc.

The allegations of the 3rd, 4th, 9th and 17th counts are not substantially different from those of the first. The 6th and 10th counts set out the same matter, except that they omit the averment that the ejection took place while the car was moving.

The 7th and 8th counts contain in addition to the allega-

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tions found in the 6th and 10th, an averment that in December, 1885, the city council of Chicago passed an ordinance, afterward accepted by the North Chicago City Railway Company, of which the defendant is the successor, giving permission to said railway company to construct and maintain a railway from its tracks in Clybourne avenue on and along Halsted street north to Fullerton avenue, so as to connect with its tracks on Lincoln avenue, and providing that "the rates of fare for any distance on the tracks of said Company, whether on the lines herein authorized or heretofore constructed, shall not exceed five cents for each passenger for any continuous travel at one ride;" and also an averment of another ordinance of the city council of Chicago, providing the rate of fare on any street railway within the limits of the city of Chicago, shall not exceed five cents, and that "at any point where any line of any street railway owned, leased or operated by any person, firm or corporation, does now or shall hereafter, within the limits of the city of Chicago, join, connect with, cross, intersect or come within the distance of two hundred feet of any other line of street railway owned, leased or operated by the same person, firm, company or corporation, any passenger who shall have paid his fare on any street car run or operated on such first mentioned line, shall, on his request, be entitled to demand and receive from the person or persons, in charge of such street car on which he has so paid his fare, a transfer ticket which shall entitle him, without further charge, to be carried on any other one line adjoining, connecting, crossing and intersecting and owned, leased or operated by such person, firm or corporation, for a continuous trip of any distance within the limits of the city of Chicago, if used within one hour after the same is issued at the point or place for which such transfer ticket was issued."

This last ordinance so set up is the so-called "Transfer Ordinance," passed first by the council in 1870, re-enacted in 1897, and against the contention of the Chicago Union Traction Company, and at the suit of the city of Chicago, found valid on appeal from a justice's judgment rendered in

December, 1901, by the Criminal Court of Cook County in April, 1902, and by the Supreme Court in December, 1902.

The 14th count merely charges an assault and battery of the plaintiff while conducting himself peaceably as a passenger, by one of the servants of the defendant, acting within the scope of his authority as such servant.

The defendant pleaded the general issue and two special pleas to this declaration, the special pleas being variations of the plea *molliter manus imposit*, alleging that plaintiff had refused to pay the usual and customary fare, and was staying in the defendant's car without the defendant's consent, and refused to leave when requested, and that defendant's servant, after gently laying hands on him to remove him, used no more force than was necessary to so do and to defend himself against the resistance and assault of the plaintiff. These pleas were traversed by replications in the nature of replications *de injuria* (although inartificially drawn) and the issues thus made up.

On the trial, over the objection of appellant, the appellee's daughter, one Mrs. Paus, was asked to give a conversation she said she had heard between her father and the conductor on the Lincoln avenue car, and answered that her father, on receiving the transfers, asked the conductor if they were good on a Halsted street car; that the conductor answered affirmatively, and that her father asked him a second time, and the conductor said, "Yes, how many do you want?"

The plaintiff himself, also over objection, was permitted to testify to the same conversation.

The plaintiff was asked and over the defendant's objection was allowed to answer questions as to what he made on the average in his business per month during the year preceding the accident, and how much he had made per month since he went back to it.

A physician who had attended the plaintiff immediately following the accident, and had seen him several times since, was allowed, over objection, to say that he did not consider plaintiff's mental condition as good after the accident as it was before.

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Morris Roach, the conductor on the Halsted street car, was a witness for defendant and was asked by defendant's counsel whether "at the time of the occurrence, January 12, 1902, the corner of Lincoln avenue and Halsted street was a transfer point from the Lincoln avenue car, going north on Halsted street." He answered, "No," but on objection and motion by the plaintiff the answer was stricken out by the court.

Both the ordinances hereinbefore described, as set forth in the 7th and 8th counts of the plaintiff's declaration, were offered in evidence by the plaintiff on the trial, and over the objection of the defendant, received.

One instruction offered on behalf of the defendant was refused, seventeen others so offered by the defendant were given. None was asked on behalf of the plaintiff. A motion for a new trial was denied by the court, and also a motion in arrest of judgment. Proper exceptions were taken to all the actions of the court complained of.

JOHN A. ROSE, ALBERT M. CROSS and HENRY W. BRANT, for appellant; W. W. GURLEY, of counsel.

LOUIS A. HEILE, LORIN C. COLLINS and WILLIAM MEADE FLETCHER, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The objections made to the judgment in this cause, based upon the rulings on the evidence, we have carefully examined, all the more carefully because the damages hereinafter discussed, seem to us very large, and the question is of great importance, therefore, whether any thing was improperly admitted in evidence tending to mislead the jury and swell the amount allowed. But we do not find in the rulings any error. The most serious question, as it seems to us, arises on the introduction of the testimony of the plaintiff that he was making in his business (that of a wholesale jeweler) each month during the year preceding the accident \$500, and that since he went back to it he had made only \$50 to \$75 a month in it. This was specifically objected to on the ground that

there was no sufficient basis for it in the pleadings, and on the further ground that a comparison of the profits in a jewelry business before and after the occurrence was not material to the question of damages. It is forcibly argued that such profits were dependent on too many contingencies to make the comparison of any value. What we might think of the question if it were *res integra* in this court, does not matter, for we think that the authorities in this State justify the ruling of the trial judge admitting the testimony and holding that the objection to it went merely to its weight and to its being a subject for cross-examination.

There can be no doubt that the declaration contained sufficient averments of a special damage in the loss of profits in business to allow the introduction of the testimony, if it were otherwise competent, and that it was so seems to us to be held in *Chicago & Eastern Ill. R. R. Co. v. Meech*, 163 Ill., 310, and *Chicago City Ry. Co. v. Carroll*, 206 Ill., 318.

The Illinois cases cited by appellant on this point seem to rest principally upon the want of averments of special damage in the pleadings. In *Chicago & Eastern Ill. R. R. Co. v. Meech*, the court says, speaking of similar evidence in relation to the profits of a contracting and employing painter: "It may be that the testimony in the case at bar in regard to prior earnings was entitled to little weight, owing to the fact that it was confined to the earnings of but a single year, but that is a question of weight of evidence and a matter that was open for argument before the jury and the courts below; and if appellants had reason to suppose that the year immediately preceding the accident was for any cause an exceptional year, they could have shown that fact on cross-examination, or by the introduction of testimony."

In the case at bar the evidence introduced seems to us of little weight, because by cross-examination it was made to appear that the appellee had gone through bankruptcy and had lost practically all his property by mortgage foreclosure the year before the injury occurred. This seems sufficient reason for a marked decrease in profits, and it must be presumed furnished ground for argument to the jury on the

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weight of the evidence in chief of the plaintiff on this subject.

We see no error in the admission of Dr. O'Neill's testimony as to his opinion of the plaintiff's mental condition before and since the injury.

It is strenuously insisted that it was error to allow evidence of the conversations concerning transfers between the plaintiff and the conductor of the Lincoln avenue car. We do not agree with this. Whether or not the plaintiff had entered defendant's Halsted street car as a passenger, in good faith, supposing that he held for himself and the party under his charge tickets entitling them to a ride thereon, or, on the other hand, was a mere trespasser trying to defraud the company, or even, in current phrase, "looking for trouble," in order to test the validity of a disputed ordinance, was a question which was material in several views. Its answer was material in throwing light on the animus of his conduct in the Halsted street car, in affecting the probability concerning disputed matters of fact in that conduct and in properly ascertaining the measure of damages for an ejection. Moreover, we think that this conversation and the transaction between the plaintiff and the Lincoln avenue conductor were in fact a part of the *res gestæ*.

It is true, as claimed by appellant, that there are many cases in which acts and conversations removed in time from the main occurrence under investigation, no further than the conversation between the appellee and the Lincoln avenue conductor was removed from the ejection, have been held not part of the *res gestæ* because not concurrent with nor "illustrating, explaining or interpreting," as it is expressed in *Chicago City Ry. Co. v. Uhter*, 212 Ill., 174, the transaction immediately in issue. But it is not concurrence in time alone, nor separation in time alone, which has been made the test, as an analysis of the cases will show. The effect of a transfer ticket on one car cannot be altogether disjoined from the circumstances attending its reception on the connecting car, without violence to common sense. If it is properly used, in accordance with the rules, the reception and attempted use of it are substantially parts of the same transaction.

We think our view of the admissibility of this evidence is founded on reason and analogy and fully borne out by authority in Illinois. *Central R. R. Co. v. Davenport*, 177 Ill., 110; *Pennington v. Ill. Central R. R. Co.*, 69 Ill. App., 628; *Wabash R. R. Co. v. Kingsley*, 78 Ill. App., 236; *Illinois Central R. R. Co. v. Harper*, 83 Miss., 560; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S., 60; and many other cases.

Nor was there any error in allowing the ordinances set up in the declaration to be put in evidence. Counsel for appellant seems to be under a misapprehension in regard to the effect of these ordinances. The Supreme Court has decided (*Chicago Union Traction Company v. City of Chicago*, 199 Ill., 484) that the transfer ordinance is valid. That means, of course, that it was valid and operative from its passage. Its validity did not depend on the decision of the court which merely announced it. The appellant chose to claim and consider it invalid, but it did so at the risk of its view of the law being, as it turned out to be, mistaken.

To eject against his will from the Halsted street car going north a person who had paid fare on the immediately preceding Lincoln avenue car going northwesterly, and who, boarding the Halsted street car at the intersection of the streets, offered evidence of such payment, was on January 12, 1902, an illegal and unlawful act, whatever litigation the company or other people were carrying on for the purpose of "testing the question as to the liability of appellant for refusing such transfers."

The illegality and unlawfulness of the ejection was a proper matter for proof, both as affecting the conduct of the parties and the measure of damages.

"We fully recognize the doctrine," said the Appellate Court of the Third District, "that a different rule obtains when the relation of passenger and carrier exists where a person is ejected from a train, than where the person is a trespasser or has not a right on the train," (*Wabash R. R. Co. v. Kingsley*, 78 Ill. App., 236), and the proposition is good law and good sense.

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It is true that the fact that an ejection is illegal and unlawful does not justify the passenger sought to be ejected in interposing resistance and counter force. But this does not make the ejection any the less unlawful, nor prevent the appellant from being "a law breaker." Counsel complain, in the statement of the case, that the company was put into the position before the jury of a law breaker by the introduction of the ordinances, and in the brief declare that the ejection was "rightful." The ejection was not rightful, and the defendant broke the law in authorizing it and the defendant's servant in executing it. The very reason given by the courts for holding that a passenger should not resist an unjustifiable demand of the conductor that he should leave the train or pay fare, is that he may recover at law, besides all other losses, damages for the indignity offered him in expelling him from the train.

If the expulsion were "rightful" there could be no recovery for any indignity in such expulsion. It is true that the expelled passenger should not physically resist, but should submit to the indignity in the interest of peace and good order, and that in consequence, for physical injuries received in resisting, if he does resist, he cannot recover unless there is used against him unreasonable or unnecessary force or he is subjected to unreasonable and unnecessary danger. But the jury were given this legal proposition in three instructions—the 14th, 15th and 18th—made indeed more favorable to the defendant than they ought to have been in our opinion, by the addition of a further statement that the conductor "had the right to use whatever force was necessary in removing said plaintiff from the car" if he refused to leave when requested, a supposed corollary of the doctrine that it was the duty of the plaintiff to leave and not to resist, which we do not think properly follows. But its statement in this form if incorrect was certainly not disadvantageous to the defendant, but to the plaintiff. No instruction minimizing or derogating from the doctrine claimed by the appellant was given to the jury. It must therefore be assumed by us that the verdict of the jury involved their belief—in the language

of the 18th instruction given them at the request of defendant—that the conductor's conduct amounted “to intentional wrong or was of such a reckless character” as showed that he had “an utter disregard of the rights or safety of other persons.” In our opinion the jury would be justified in so believing if they also believed that the car was moving when the plaintiff was ejected, or if they believed that force and violence greater than was reasonably necessary to eject the plaintiff were used on him, and that his injuries were received because of such unnecessary force and violence, and not because of any resistance that he may have made.

It is hardly necessary, in view of the conflict in the evidence and the verdict of the jury, for us in passing on the question raised on the effect of the evidence as a whole by some of the assigned errors by appellant, to go farther than the question of whether the jury were warranted in finding that the car was moving at the time of the ejection, for there could be no justification for ejecting the plaintiff from a moving car, and if there was evidence which, if believed by the jury, warranted them in finding that this was done, we cannot, in the absence of any special findings, assume that their verdict was not based on it.

Before discussing the weight of the evidence and the sufficiency of the case made by the plaintiff, we must allude to the point made by appellant that the conductor of the Halsted street car was erroneously prevented from testifying, as it is put by appellant's brief, “that the corner of Lincoln avenue and Halsted street was not a transfer point under the regulations of the defendant company.”

Farther on in its brief appellant says: “It was necessary to permit us to show that this conductor whose actions were complained of knew that fact (*i. e.* that this point was not a transfer point) and was acting in accordance with appellant's instructions and orders.”

We think that it was proper to allow the defendant to show that the conductor had instructions not to recognize the transfer in question, and, as appellant itself points out, the Lincoln avenue conductor testified to this effect concerning

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the regulations of the company without objection, and the division superintendent, McGowan, was allowed so to testify over objection. We think also that such is the purport of the testimony of Roach, the Halsted street conductor. The contrary view seems to us a misconception. By examination of the record we find that the question first asked Roach was, "At the time of this occurrence on the 12th of January, 1902, state whether or not the corner of Lincoln avenue and Halsted was a transfer point from the Lincoln avenue car going north on Halsted." The question was objected to and the objection overruled. The witness answered "No." Then the question was put to him: "State whether or not, prior to the 12th of January, 1902, and at that time you had any instructions regarding the acceptance of a transfer from Lincoln avenue cars north on Halsted?" Objection was made to this question, but before any ruling was made on it the trial judge, who had evidently been reconsidering his ruling on the prior question, said that in *that* ruling he believed he was wrong, because the question was not as it should have been, "whether under the rules of the company transfers were received at that point," but "whether it was a transfer point," which might be a conclusion. He therefore reversed his ruling and struck out the answer "No" of the witness above stated. In this we think the court was right. The next question above indicated was then repeated without objection, and was answered by the witness "We had." Afterwards the witness, apparently without further questioning, seemed to be about to give the nature of the instructions, and was stopped by general objection, which might well have been on the ground that his attempted statement was responsive to nothing. This question was then asked him: "State whether or not on the 12th of January, 1902, at the time of this occurrence, you, acting under your instructions, accepted transfers from Lincoln avenue cars north on Halsted?" This colloquy then took place:

"MR. FLETCHER: Objected to as calling for a conclusion and immaterial.

THE COURT: Yes, *it is not immaterial*. It is the *form* of the question; the objection is sustained. (Exception.)

MR. NEELY: Mr. Roach, on the 12th of January, 1902, and just prior thereto, what were your instructions?

MR. FLETCHER: Objected to as being immaterial.

THE COURT: It appears from the evidence that they were in writing. * * He (*i. e.* the superintendent) said some instructions, as I remember it, were in writing, and any conductor that did not understand it, he went to him and he explained them to him verbally.

MR. NEELY: I will put a question that I think will straighten it out, your Honor. * * * Mr. Roach, state whether or not you were acting under instructions as to transfers offered from the Lincoln avenue line to the North Halsted street line? You can answer it yes or no.

MR. FLETCHER: I object to it as calling for a conclusion.

THE COURT: Overruled.

MR. FLETCHER: Exception.

ANSWER: Yes, sir, I was acting under instructions from the company.

Q. From whom did you get those instructions?

A. Those instructions were given by a bulletin board in our barn where we start from to go out on the line.

MR. FLETCHER: I move to strike out everything.

THE COURT: The answer may stand."

The witness then proceeded without further objection to say that if they did not understand their instructions, they would ask the foreman to tell them what to do; that he had instructions from the foreman as to what to do about transfers from Lincoln avenue to North Halsted street; that he got them both from the bulletin at the office and from the man that broke him in as a student a year and a half before, and that there had been no change since that time on that instruction on that transfer point.

From this somewhat extended excerpt from the record it will be clearly seen that the court did not rule on the direct question, "What were your instructions?" but that counsel for appellant withdrew it and asked another, and that the answer to this last question was evidently understood by all,

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undoubtedly including the jury, to mean that in refusing the transfers in question the witness was obeying the rules of the company. We think, therefore, that the appellant has no ground of complaint on this score.

We are urged to hold any verdict against the defendant contrary to the palpable weight of the evidence, and in consequence to hold it error in the trial court not to have taken the case from the jury by a peremptory instruction, and not to have granted a new trial. This we do not think we should be justified in doing.

Appellant argues that the evidence establishes the facts that the conductor told plaintiff that he must either pay fare or leave the car, and that the plaintiff refused to pay the fare; that thereupon the conductor led or pushed him out of the car without unnecessary force or violence, and impliedly at least, it is argued, without refusing him a reasonable opportunity either to pay his fare or leave. Finally, it is insisted that the great weight of the testimony shows that the car was at a standstill at the time.

As we have said, we do not think it necessary in this discussion to go further than the question of the motion or stoppage of the car; but it is well, perhaps, to say that we do not agree with the appellant on the other portions of the proposition it makes regarding the evidence. It is conflicting to some extent, but there is no disputing that a small man sixty-six years old, with two ladies and an infant in his party and under his care, who in good faith deemed himself and them to have paid a fare which entitled them to passage in the car, who had what he deemed proof of that in his hands, and who actually was entitled to such passage for himself and them under the law, was pulled up from his seat, hustled through the car and put off the same by a man clothed with certain recognized authority, almost a foot taller and but twenty-four years old.

The line between necessary force and violence and unnecessary force and violence may be sometimes hard to draw, but the facts above recited being assumed, we think that if the jury, independently of other considerations, were from the

conflicting evidence warranted in further believing that no sufficient explanation was given or opportunity for explanation vouchsafed, that no reasonable opportunity was offered the plaintiff not only to pay fare, but to leave the car safely and to take his wife, daughter and child with him—in other words, that the actions of the conductor were so prompt, summary and ill-tempered as, in the language of the instruction hereinbefore quoted, to be “of such a reckless character as to show an utter disregard of the rights or safety of other persons,” that a verdict for the plaintiff could and ought to be sustained, without at all derogating from the doctrine that it was the duty of the plaintiff to offer no physical resistance to his expulsion. There is in the conflicting evidence, in our opinion, sufficient, if believed, to justify the finding of the jury.

Even if this were not so, it cannot be doubtful that the duty of the conductor was to see that the car had fully stopped before compelling the plaintiff to leave it. Such resistance as was necessary to avoid being thrown from a moving car certainly could not be imputed as a fault to plaintiff. Counsel for appellant say that the evidence proves that the car had stopped, but we do not so read it. There was a direct conflict concerning the point, but at least five disinterested witnesses swore positively that the car was moving when the plaintiff was put off. The criticism of their testimony and the argument concerning their inability properly to observe the situation, made by appellant’s counsel, is not convincing, and we think the jury were justified in weighing the credibility of the witnesses and finding that the conductor acted in anger and in reckless disregard of plaintiff’s safety.

The appellant argues that even if the car was moving when the plaintiff was put off, yet if his fall was in a struggle in which the plaintiff was assaulting or threatening to assault the conductor and as an incident thereof, there can be no recovery. We have said that the plaintiff had a right to resist, even to struggling, being put off a moving car. This would not give him the right to assault the conductor with his cane, but we are relieved from the necessity of consider-

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ing whether the contention of the appellant is sound by the fact that there is no testimony to support the hypothesis it suggests.

Roach, the conductor, Garret, the motorman, and Alma Griffies, a witness for defendant, are the only ones who swore to any assault or threatening of an assault on the conductor with a cane, and they all testified that the car was at a standstill and the plaintiff safely off of it and on the ground before he threatened or struck the conductor. Roach and Garret say that after he was on the ground he turned while standing on the street and struck Roach with his cane. Miss Griffies says the plaintiff did not strike the conductor, but ascended the step again and threatened him with his cane. There are witnesses for the plaintiff who say that they noticed a cane in the plaintiff's hands, and that they saw him put his hands out and up with the cane in them, which was natural enough even on the plaintiff's theory of the occurrence; but it cannot be fairly inferred from the testimony of any one of them that he or she saw anything like a threatening motion, and some of them, like Miss Griffies, witness for the defendant, contradict the motorman and conductor about the alleged blow. Miss Griffies says that when put off the plaintiff was protesting, which he surely had a right to do.

The jury were instructed as requested by defendant, that if they believed from the evidence that plaintiff was injured after he had left the car and had safely alighted on the ground, they must find the defendant not guilty, and more specifically that if they believed from the evidence that after the plaintiff was off said car and safely on the street he struck or struck at the conductor with a cane, and that then said conductor, because of being so struck or struck at, pushed said plaintiff so that he fell, etc., the defendant would not be liable for the injuries plaintiff received.

It must be presumed, under these instructions, that the jury did not believe the defendant's witnesses, but believed from the testimony of plaintiff's witnesses that the injuries were received by the ejection from a moving car and a consequent fall.

A variance between the appellee's declaration and the evidence is alleged by the appellant and is urged as a ground for the contention that the case should have been taken from the jury by the trial court, and for the contention that the refused instruction No. 1, offered by the defendant, as follows:

"1. The court instructs the jury that the plaintiff has alleged in his declaration and in each count thereof, that the said conductor willfully, maliciously and wantonly, with great, unnecessary and excessive force and violence, did expel, thrust and eject the plaintiff from said car while the same was moving at a high rate of speed and thereby did throw and cause him to be thrown down to and upon the ground. This is a material allegation of said declaration, and of each count thereof, and the burden of proof is upon the plaintiff, and he must prove said allegation by a preponderance or greater weight of the evidence before he can recover for injuries sustained by him, if any, by being thrown to the ground. If you believe from the evidence, under the instructions of the court, that at the time and place in question, that the car came to a standstill and that the said plaintiff alighted or was put off said car by said conductor, and that he was safely upon the ground and that he was not expelled, or thrown or ejected from said car while said car was moving at a high rate of speed, then the plaintiff cannot recover for the injuries sustained by him, if any, by being thrown to the ground,"

should have been given.

So far as the instruction is concerned, all that was proper in the instruction was covered by others which were given. It is not true that the plaintiff alleged in each count of the declaration that the ejection was while the car was moving at a high rate of speed; nor is it true that the rate of speed was material and must have been proved as charged. So it is explicitly held in *Illinois Central Railroad Company v. Davenport*, 177 Ill., 110.

It is claimed by the appellant that a variance exists between the declaration and the proof, because the form of ac-

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tion is trespass and the proof would only support an action on the case. The argument in support of this claim is highly technical and is unsound. The very cases which counsel for appellant cite in their argument seem to us authorities for the contrary view, and their contentions appear inconsistent and self-destructive. They say that because the defendant company authorized and required its servant to do an unlawful act, the act became rightful and lawful so far as the servant was concerned, and therefore the defendant company would not be liable in trespass, but only in case, because the servant's act was rightful. But even before the section of the Practice Act which abolished the distinction between actions of trespass and trespass on the case, and declared that in all cases where trespass or trespass on the case had been theretofore the appropriate form of action, either of the forms might be used, as the party bringing the action might elect, the Supreme Court, speaking through Judge Caton in *St. Louis, Alton & Chicago Railroad Company v. Dalby*, 19 Ill., 353, said that where a person was removed from a car by an authorized agent of the company, when he had not refused to pay the fare he was legally bound to pay, the company was liable in an action of trespass. In that case the conductor was following the general orders of the company, which however were illegal, as in the case at bar, and the judgment in trespass was affirmed.

The doctrine contended for by the appellant is an entirely different one from that which was recognized by the instructions—that the passenger should not physically resist the unlawful expulsion, and cannot recover for physical injuries received in consequence thereof if he does—with which appellant appears to confound it. The point appears even less well taken, if possible, in view of the section of the Practice Act which we have quoted. Moreover, we agree with the position of appellee that it was not properly brought to the attention of the trial court even had it been valid, and cannot, therefore, be considered here.

Finally, the appellant urges that the damages are excessive. We think they are very large, and this matter has given us

some hesitation in affirming this judgment as it stands. We do not think them so large, however, in view of some of the evidence, as clearly to show passion and prejudice on the part of the jury; and it is impossible to determine from the verdict given on what basis the jury gave them. We feel, in consideration of the whole case, that in requiring a *remittitur* we should invade the province of the jury, although we should have been better satisfied with a smaller verdict.

We cannot and do not, in view of the authorities in this State—for example, Chicago, Burlington & Quincy R. R. Co. v. Bryan, 90 Ill., 126, and Illinois Central R. R. Co. v. Davenport, 177 Ill., 110—hold that exemplary or punitive damages could not be given in this case against the defendant, but if we could know that the jury fixed the amount of the damages on such a basis, we might be inclined to compel a *remittitur* as a condition of affirming the judgment, for although punitive damages might be allowed, their amount would be a proper subject for our consideration. But no instructions were asked by appellee or given by the court suggesting such damages, and it may be that the jury, with the witnesses and the plaintiff before them, considered that the damages given were merely compensatory for the injuries which they believed from the somewhat conflicting evidence were received.

We do not think that the evidence of loss in the plaintiff's business was conclusive or very important under the circumstances shown but the evidence of the plaintiff himself and of his daughter and of the physician who attended him, tended to show permanent injuries both to the plaintiff's mind and body. His memory, his nerves of motion, his voice, his hearing and his eyesight were permanently affected, according to his own and his daughter's testimony. The physician diagnosed among his injuries concussion of the brain and a fracture of the skull. The indignity offered to him was great, and the physical pain and suffering, according to his testimony and that of his daughter, very great.

Although testimony offered by the defendant's witnesses tends to contradict some of the statements made by the daugh-

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ter and other witnesses for the plaintiff regarding his condition immediately after the occurrence, the jury may have preferred to believe the latter.

The judgment is affirmed.

Affirmed.

Chicago City Railway Company v. Catherine McDonough, Administratrix.

Gen. No. 12,126.

1. **RIGHT OF RECOVERY**—*particular instruction upon, held not ground for reversal.* The following instruction pertaining to the right of recovery, held, in connection with the other instructions given in the cause, not ground for reversal:

"You are instructed as a matter of law that if you find from the evidence that the defendant has been guilty of negligence, and that such negligence caused the injury to the plaintiff's intestate complained of in the first, second, third and sixth counts of the amended declaration, or any one of said counts, and that before and at the time of such injury the plaintiff's intestate was in the exercise of ordinary care for his personal safety, then your verdict will be for the plaintiff."

2. **NEGLIGENCE**—*instruction as to how question of, should be determined, held not reversible error.* The following instruction upon this subject held, in connection with the other instructions given in the cause, not ground for reversal:

"You are further instructed, as a matter of law, that the question of whether or not the defendant was guilty of negligence is for your determination upon all the circumstances and facts proven in the case."

3. **RES GESTÆ**—*what part of.* The motorman's treatment of a signal of danger and his remark made in connection therewith are competent as part of the *res gestæ*.

4. **SPEED**—*what evidence upon subject of, not ground for reversal.* The statement of a witness that the car at the time of the accident in question was going at "full speed" is not of such a character as calls for a reversal.

5. **RULES AND REGULATIONS**—*when competent.* The rules and regulations of a traction company known as well to the party injured as to the servant alleged to have caused the injury and which were promulgated for guidance in such a contingency as that existing at the time of the accident, are competent upon the question of the contributory negligence of the one and the negligence of the other.

6. REMARKS OF COUNSEL—*when improper, will not reverse.* Improper remarks of counsel which have been objected to are not ground for reversal where such objection was sustained and counsel making such remarks rebuked, unless injury appears to have resulted.

7. CONDUCT OF JUDGE—*what not improper.* The remark of the trial judge to the effect that he would adjourn court if necessary to allow plaintiff's counsel to secure the attendance of a desired witness is not improper and consequently will not reverse.

8. CONDUCT OF JUDGE—*what not reversible error.* The trial judge is permitted to exercise a discretion in regulating the arguments of counsel and unless he abuses such discretion a reversal will not follow. In this case it is held that the refusal of the trial judge to permit counsel to use a manuscript in his argument to the jury was not an abuse of discretion.

9. HIGH RATE OF SPEED IN A FIRE ENGINE—*not negligence.* It is not proof of negligence that a fire engine is driven to a fire at a higher rate of speed than is allowable in the streets for a private carriage.

BALL, J., dissenting.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1904. Affirmed. Opinion filed December 4, 1905.

Statement by the Court. The plaintiff below, the appellee here, secured in the Circuit Court of Cook County a judgment of \$5,000 against the Chicago City Railway Company, the defendant below and appellant here, under the statute allowing damages to the personal representatives of a deceased person for the benefit of the next of kin for causing the death of the deceased by wrongful act, neglect or default.

The cause was tried before a jury and the judgment was rendered on their verdict after a motion for a new trial and a motion in arrest of judgment had been made by the defendant and denied by the court, and exceptions taken to said action. A motion by the defendant was made and denied after the plaintiff's evidence was concluded, and renewed and again denied after the conclusion of all the evidence, for an instruction that the jury should find for the defendant.

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The deceased, Bernard McDonough, at the time of his death was 51 years old. He left a wife and five minor children. He was a member of the fire department of the city of Chicago and had been so for 22 years. He was lieutenant of company 49, the crew of the fire engine of which on the night of the accident which resulted in his death, consisted of himself and three other persons—Mesbauer, the driver, and Roe and Drews, engineers, firemen, or other employees of the department. During the night of September 27, 1900, an alarm of fire was received at the engine house of company 49, which was at 1742 47th street, about 125 feet west of Marshfield avenue. It was not far from half past ten o'clock. The fire was at the corner of 51st street and Centre avenue, a little more than half a mile east of the engine house and just half a mile south. The hose cart left the house first under the charge of the captain of the company. The fire engine followed shortly after, but the start of the hose cart made it precede the engine by something more than a block. Both hose cart and engine ran east on 47th street, turned south on Marshfield avenue and east again on 51st street, which was the only paved street and the only one with railroad tracks in it between 47th street and 55th street. It has a double track, and the fire engine swung into the south track on its way eastward. Both hose cart and engine carried lights and a gong. The engine was in charge of the deceased, Bernard McDonough, who sat with the driver and had control of the speed and direction of the engine, the driver as well as the rest of the crew being under his orders. Ashland avenue is the next north and south street east of Marshfield avenue, and on it there are double car tracks of the appellant, crossing 51st street and extending from 69th street to Archer avenue. An electric motor car of the appellant corporation coming north on the east track ran into the engine at the crossing at 51st street. It struck the hind wheel of the engine (between the front and rear wheels, the motorman says) after the horses attached to it had cleared the track. The hub of the hind south wheel and one of the spokes were bent and the axle was badly

sprung. The engine tilted to the north and all the men were thrown off. McDonough was seriously injured and was taken to the hospital, where he died from his injuries three days later. The other men were hurt less seriously. The engine righted itself and the horses ran eastward with it without a crew or driver. The headlight of the car was knocked off, the fender and dashboard bent, the front forward trucks thrown off the track and a part of the flange of the wheel broken off. It was able, after being replaced on the tracks by the wrecking crew, to go to the barn by its own motive power.

These facts connected with the accident are undisputed. Other material circumstances, concerning which there is a conflict in the testimony, will be alluded to in the opinion so far as it seems necessary.

For the declaration in the cause as originally filed, there was substituted an amended declaration in eleven counts, and after an amendment of one of them the cause went to trial on these eleven counts and the general issue filed to them. At the conclusion of the plaintiff's evidence, however, the court, although refusing to take the case from the jury, instructed the jury that the plaintiff had failed to make out a case under the 4th, 5th, 7th, 8th, 9th, 10th and 11th counts of the declaration, thus leaving to go to the jury only the 1st, 2nd, 3rd and 6th counts.

The first count alleged the duty of the defendant to be to run and operate the car at a moderate and reasonable rate of speed in approaching and passing over said crossing at night, and stated the breach of it to have been in running the car at an unreasonable and dangerous rate, and not using the care and prudence which the safety of those likely to be imperiled by the running of said car demanded, whereby the deceased, while in the exercise of due care and diligence and while doing his duty as a member of the fire department, was killed.

The second count stated the defendant's duty to be to cause the car to be run under such control and lessened speed in approaching and passing over said crossing, that the motor-

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man could stop it within a reasonable distance upon the appearance of danger to others, and the breach of it causing the accident to have been that the car was not run under such control and lessened speed.

The third count declared the same result to have been caused by the breach of the defendant's duty to cause a bell or gong on the car to be rung or sounded just before the car ran upon said crossing, and to keep said bell or gong constantly sounded while said car approached the crossing.

The sixth count declared the breach of duty causing the injury to be in the servants of defendant negligently, carelessly and improperly failing to watch and look out for the approach or passage of fire engines upon said street over said crossing, and failing to look to see if said crossing was and would then and there be clear for the passage of said car, and failing to try to ascertain if it would be so clear, and giving no more attention and exercising no more watchfulness as to whether the track ahead of said car was clear while it was approaching and passing said crossing than at other places on the route of said car.

From the judgment of the Circuit Court the Chicago City Railway Company appealed to this court, and here assigns and argues alleged errors involving the following propositions: That improper evidence in behalf of the appellee was admitted on the trial; that erroneous instructions were given to the jury; that appellant was prejudiced and deprived of a fair trial by improper utterances of the trial judge and of the counsel for appellee before the jury; and that the verdict was against the clear weight of the evidence.

WILLIAM J. HYNES, SAMUEL S. PAGE and WATSON J. FERRY, for appellant; MASON B. STARRING, of counsel.

I. T. GREENACRE, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The jury in this case had close and doubtful questions of fact to decide on conflicting evidence. It was very necessary, therefore, that they should be correctly instructed as to

the law, and that nothing should have been erroneously admitted in evidence or allowed to happen before them which it is apparent might have misled them. But after a careful examination of the matters complained of by the appellant, we fail to find in them anything which could reasonably be supposed to have had such an effect.

Appellant asked from the court thirty-nine instructions, thirty-three of which were given as asked, two of which were modified, and four of which were refused. The appellant does not here complain of the refusals or modifications. The instructions which were thus given at appellant's request very completely covered the law necessary for the jury to know. The first seven of them respectively informed the jury that the plaintiff had failed to make out a case under the 4th, 5th, 7th, 8th, 9th, 10th and 11th counts of her declaration, and that therefore they should disregard those counts altogether.

The next instruction given at the request of appellant tells the jury that the plaintiff cannot recover at all unless they find that she has proved by a preponderance of the evidence that the deceased was not guilty of any want of ordinary care, prudence and caution for his own safety which proximately contributed to the alleged injury, and that the defendant *was guilty of some particular negligence charged in some count of the declaration submitted to the jury*. The jury were further instructed that the burden of proof was not upon the defendant to show that it was not guilty of the specific charges of negligence in the counts submitted for their consideration, but that the burden of proof was upon the plaintiff to show by a preponderance of evidence that the defendant was so guilty.

We think, therefore, that as all the instructions are those of the court and must be taken and considered as one connected series, of which obligation the jury by instructions given by the court of its own motion, was explicitly informed, there can have been no harm done by the lack of precision excluding ambiguity in the first instruction given at the request of appellee. It is:

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"You are instructed as a matter of law that if you find from the evidence that the defendant has been guilty of negligence, and that such negligence caused the injury to the plaintiff's intestate complained of in the first, second, third and sixth counts of the amended declaration, or any one of said counts, and that before and at the time of such injury the plaintiff's intestate was in the exercise of ordinary care for his personal safety, then your verdict will be for the plaintiff."

That this instruction is capable of a construction which removes the objection made by appellant, that it does not restrict the negligence for which the plaintiff can recover to that mentioned in the declaration, is evident if we insert parenthesis marks around the clause "and that such negligence caused the injury to the plaintiff's intestate." Making this a parenthetical clause would plainly show the following clause, "complained of in the first, second, third and sixth counts of the amended declaration, or any one of said counts," to limit the word "negligence" and not the word "injury." That this instruction might be construed so as to state a correct principle of law would not by itself—if it could be construed in a different sense—remove the objection to it or render it harmless; but when it is considered that it would be very unnatural for the "injury to the plaintiff's intestate" to be characterized as "complained of in the first, second, third and sixth counts of the declaration, or any one of said counts" (since the injury to the plaintiff's intestate was described in exactly the same words in all four counts), but that it would be very natural that "negligence" of the defendant should be so characterized, and when to that consideration is added the fact that the proposition of law which the correct construction of this instruction would make it state was very explicitly given to the jury in two other instructions of the series, which also explicitly negative the erroneous proposition which appellant's counsel allege can be found in it, we think it is clear that there can be no reasonable ground for fear that it misled the jury or was misunderstood by them.

As to the third instruction, the only other one attacked by the appellant, which is as follows: "You are further instructed, as a matter of law, that the question of whether or not the defendant was guilty of negligence is for your determination upon all the circumstances and facts proven in the case,"—it is plain also that if the jury understood from the instructions as a series, as we think they did, that the "negligence" with which they were concerned was only the negligence "complained of in the first, second, third and sixth counts of the declaration, or some one of them," the instruction was harmless, and indeed entirely accurate. Our view of the harmlessness of these instructions in connection with the others given is supported by the authority of the Supreme Court in similar cases: *Chicago City Ry. Co. v. Roach*, 180 Ill., 174; *Masonic Temple Association v. Collins*, 210 Ill., 482; *Chicago City Ry. Co. v. Bundy*, 210 Ill., 39; *Chicago, Rock Island & Pacific Ry. Co. v. Leisy Brewing Co.*, 174 Ill., 547.

Nor do we think that there was any reversible error in the rulings of the trial court on the admission of evidence. It is complained that certain improper testimony of a lad named Murphy was admitted and allowed to stand. Murphy claimed to have given the motorman of appellant's car signals of danger before the engine had reached Ashland avenue and while the car was between Fifty-second and Fifty-third street.

Murphy testified: "I ran to the sewing machine store (Hipshee's) on the east side of Ashland avenue about three doors from the corner" (of 51st street). "I was in the middle of the track waving my hat and hands in the north-bound track. I started waving my hat and hands and hollering for them to stop, and the motorman told me to go to hell out of there or he would run over me. When I commenced to wave the car was about the width of four lots away from me. I don't know how wide the lots are. The motorman shut off his controller and pulled back his brake and told me to go to hell out of the way or he would run over me. He then turned back his controller and let the car go full

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run again as fast as ever. When he shut off his power and put on his brake he was in front of Hipshee's, and as he turned it on again he hollered at me. How I knew he turned it on was, I could hear the sound of the thing, turning it back, and it started off all of a sudden. I could not say how these cars were run there. When I commenced flagging him he was running fast. After I flagged it, it did not change speed. He went kind of slower, and then he started faster again. When he started faster he was right at Schoolman's wine house." (Between Hipshee's and the corner.) "The next thing I saw was the engine coming towards the corner and the car as it struck the crossing. The car ran into the hind end of the engine, threw the men off, and went right along. The motorman went back into the door, kind of let go of this thing, and stepped back, and as he did, the jar of hitting the engine knocked him back in the middle of the car on his back. * * * the door was open and the jar threw him down—the jar of the engine. * * * There was no bell rung except the fire engine and hose cart. Car bell never rang."

This testimony was contradicted in certain parts by the motorman himself, and the appellant's counsel argue for its entire untrustworthiness, but on the assumption that the story told by Murphy is a correct version of the occurrence, it would seem plain from reading it that Murphy's trying to stop the car and the motorman's treatment of the attempt, including his alleged remark (which remark is the testimony appellant objected to and unsuccessfully moved to strike out), were part of the *res gestæ*, almost contemporaneous with the accident and serving "to explain, illustrate, qualify, limit or characterize the act which is the subject of the inquiry." *City of Chicago v. McKechney*, 205 Ill., 372; *Chicago v. City Ry. Co. v. Uhter*, 212 Ill., 174.

As we had occasion to say in an opinion just filed in another case, absolute concurrence or separation in time is not the only test as to matter forming a part of the *res gestæ*. In the present case, assuming the truth of Murphy's story, it would seem impossible for him to give an account of the acci-

dent of which he was an eye-witness, which should be the whole truth that he was sworn to state, and omit these words of the motorman addressed to him.

Exception was taken by appellant to the statements of a Mrs. Schoolman, and of a police officer, Patrick Nugent, eye-witnesses of the accident, that the car was running at full speed up to the time of the collision. Counsel say it might have been competent for them to have testified that the car was going "fast," but that it was incompetent for them to use the term "full speed," because they were not shown to know what "full speed" was. We do not think there was any reversible error in allowing this testimony to stand. The expression which was used was practically in this connection, and in the mouths of these witnesses, tantamount to that which it is conceded would have been proper to admit. Nobody would understand from the statement that witnesses knew or were alleging that the limit of the car's motive power had been reached. It meant, in common parlance, that the car was going at the usual rate of street cars in that vicinity when not under some particular check. It could not have misled the jury. Cross-examination as to what was meant was available. The expression was not a happy one, and there might be circumstances under which its use would be so objectionable as to be reversibly erroneous, but to hold it so here would be unjustifiable.

It is further objected that it was erroneous to permit appellee to introduce in evidence certain rules and regulations of appellant's train service department. Those objected to in argument are as follows:

"When crossing prominent streets or passing cars or trains which are stopped or running slow on opposite track, drivers and gripmen will slacken speed, and in case of disabled brake connection, conductors will keep a sharp look out to help with handbrakes;"

"While train or car is in motion, the responsibility for safe running rests with the motorman, gripman or driver, who will never allow any unauthorized person to handle the levers, brakes, etc;"

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"When vehicles of the fire department are in the street running to a fire, right of way must be given them as far as possible. Stop train until department has passed. When fire department has hose stretched across track, do not approach nearer than 200 feet, then notify general office at once by telephone, giving the line, place, etc."

There were other rules admitted—one ordering motor-men and gripmen to sound a gong when approaching intersecting streets; one instructing them to have their cars under complete control when approaching street railroad crossings, and not to run their cars at greater speed than four miles per hour for at least 100 feet approaching the crossing; another to the same effect, that the car should be under full control when approaching intersections in order to avoid collisions, and including a statement that "apparatus of the fire department, police department, ambulances, etc., have the right of way over street cars."

The discussion as to the admission of these rules was out of the hearing of the jury, but those admitted were read to them. Counsel for appellant asked and secured from the court the following instruction concerning them:

"The court instructs you that the rules of the defendant company which were received in evidence were not admitted by the court as substantive grounds of recovery, but only as bearing upon the question of the care exercised by defendant's employees."

The evidence showed that both the deceased and the motor-man in charge of appellant's car knew these rules. We think on reason and authority that they were therefore admissible and competent, not only for the purposes mentioned by the trial judge, but also as affecting the question of contributory negligence on the part of the deceased. Certainly his view of the speed with which his engine could safely be hurried to a fire would be properly modified by his knowledge of what, under these rules, he had a right to expect from the street car service. *C. & A. R. R. Co. v. Kelly*, 182 Ill., 267; *C. & St. P. & K. C. Ry. Co. v. Ryan*, 165 Ill., 88; *L. S. & M. S. Ry. Co. v. Ward*, 135 Ill., 511.

The objection of appellant is especially directed to portions of the rules said to be inapplicable and irrelevant under the facts of this case. The inapplicable and immaterial matters seem to have been portions of entire paragraphs which contained pertinent propositions, and we do not see how the appellant could have been harmed by their admission.

Complaint is made of improper remarks before the jury by counsel for appellee and by the court. The first alleged instance is a remark in the opening address of appellee's counsel to the jury,—that the company "had made some arrangements" with the three other men on the engine "of some kind." Counsel was promptly interrupted by appellant's counsel, and rebuked by the court, and the jury informed that they must pay no attention to the statement. The remark was improper and it is true, as was said in *The Fair v. Hoffman*, 209 Ill., 330, that the interference and adverse ruling of the court "do not always entirely cure the injury" of such improper remarks; but it is also true, as laid down in the same case, that "unless it is apparent from the record that some injury was suffered or did likely result by reason of such remarks, they will not be considered as reversible error."

We do not think that it is apparent from the record in the present case that injury resulted from this remark so promptly rebuked and withdrawn from the attention of the jury, or that, as urged by appellant, the subsequent conduct of appellee's counsel or of the court, lent any additional force or effect to it.

The second instance of alleged misconduct is that the trial judge announced at a certain point in the trial, and during an afternoon session, that he would adjourn if necessary to allow plaintiff's counsel to secure the attendance of a desired witness. This was not improper or injurious to anybody. It was in the exercise of the trial judge's undoubted discretion in the interest of a full investigation of the facts.

The third instance of alleged misconduct is in the court's reproving counsel for appellant, during his final argument, for persisting in some course of conduct about reading from

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notes, the court saying: "I never approve of a lawyer having a manuscript before him when speaking to a jury," and characterizing as "a tricky evasion" of this rule something not exactly perhaps made clear by the record. We do not feel called upon to express any view of our own about the propriety or impropriety of counsel referring to stenographic notes and reading excerpts therefrom in his argument. The trial court must be allowed discretion in such matters in the conduct of a trial in the interest of promptness and efficiency, and if he announces a rule not wholly unreasonable about arguments, counsel should yield without improper persistence. It does not appear here, from an inspection of the record, that this passage between counsel and court, or the ruling of the court, was likely to have prejudiced the jury, or had any effect on them. Our conclusion is, therefore, that unless the verdict was so clearly and manifestly against the weight of the evidence that the court below should have granted a new trial, and that we should reverse this judgment because it did not, there is no justification for our setting it aside.

It was hardly necessary for counsel for appellee to enforce upon us the respect due to the verdict of a jury on questions of fact, or for those for appellant to insist upon our obligation, on their complaint, to examine the record to ascertain if such verdict is not contrary to the manifest weight of the evidence and to act accordingly. We are too frequently reminded of both duties to be likely to forget either.

In this cause, as we have indicated, we regard the issues of fact as close and doubtful. The evidence was to some extent conflicting. We have very carefully examined it all, but it would be of little service, we are convinced, to discuss it in detail and we shall not do so. We shall only mention a few of its most salient features. Three differing hypotheses seem to us possible under this evidence in different views of it and according to the credence given to different portions of it: First, that both the deceased and the appellant's servant, the motorman of the colliding car, were guilty of negligence; second, that the deceased was guilty of negligence, but

not the motorman; and third, that the motorman, but not the deceased, was negligent. A fourth hypothesis indeed, that neither party to the collision was negligent, but that it was, under the circumstances, an inevitable accident, while both deceased and motorman were in the performance of their respective duties exercising due care, may not be excluded, although it is hard to conceive of such a collision as resulted in the death of McDonough as necessary or unavoidable. But in any event it is, of course, only if the third hypothesis suggested can be sustained by evidence in the case, and is not against the manifest weight of all the evidence heard, that the verdict of the jury can stand.

Appellant insists that the third hypothesis is inadmissible, that the evidence clearly establishes either the first or the second. It is undeniable (and indeed a denial is not attempted) that the fire engine was running very fast—"at a gallop," "as fast as they could"—along 51st street and over the Ashland avenue crossing at the time of the collision, and that the speed was under the control of the deceased, who was in command of the engine crew. It is therefore argued by appellant that the deceased was violating an ordinance of the city of Chicago, which was introduced in evidence, and consequently was *prima facie* guilty of negligence. The ordinance is as follows: "No hose carriage, hook and ladder carriage, or engine shall be drawn faster than a walk on its return from a fire or an alarm of fire, nor shall any such carriage or engine be drawn on any sidewalk opposite a paved or planked street, nor shall any such carriage or engine be drawn to a fire or alarm of fire in a manner calculated to endanger the safety of persons or property in the streets or alleys of said city under the penalty of not less than five dollars nor more than twenty-five dollars to be paid by the person or persons committing the offense."

In the case of *Morse v. Sweenie*, 15 Bradwell, 486, this court, speaking through Judge McAllister, in case of a collision between the plaintiff's carriage and a fire engine under the control of the defendant, held that in view of this ordinance an instruction which was based on a theory that the

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fire department going to a fire had "rights to the use of the streets not only superior to but exclusive of those appertaining to other citizens," which declared that it had "a right to proceed at any rate of speed the exigencies of the situation demanded," and contained "no hypothesis as to the exercise of any degree of care or prudence" on the part of the firemen, was erroneous. No such instruction was given in this case. In many instructions asked by the appellant the jury were told that the plaintiff could not recover if the evidence showed any want of care or prudence on the part of the deceased which proximately contributed to his injury, and were specifically instructed also that under the ordinance introduced it was the duty of those in charge of the fire engine in question, in answering the alarm of fire on the occasion in question, not to drive said fire engine "in a manner calculated to endanger the safety of persons or property in the streets or alleys of said city." It is our opinion that these instructions stated the law sufficiently favorably to the defendant, and properly left to the jury the question of fact whether or not the engine was, under the circumstances, going to the fire "in a manner calculated to endanger the safety of persons or property in the streets or alleys of the city." The circumstances would properly include the nature of the duties of the engine crew, their knowledge of the appellant company's rules, their acquaintance with the ability of motormen to stop cars quickly, and all the material surroundings.

It is to be noted that no maximum rate of speed allowed is fixed by the ordinance. For us to hold as a matter of law that because an engine was going at a high rate of speed to a fire—higher even than would be justifiable or allowable or perhaps prudent and careful in a private carriage—its crew were therefore violating this ordinance and guilty of negligence, would tend to paralyze the necessary agencies for saving life and property in a city that has had its full experience of insufficient fire protection.

If the mere fact of a high rate of speed does not in itself prove contributory negligence on the part of deceased, the existence of such negligence must be predicated on the propo-

sition that the driver under his control, and in obedience to his directions to go fast, recklessly tried to pass in front of the car, although he saw or might have seen it to be dangerous, or on the proposition that the engine under deceased's direction was going so fast and the horses had been lashed into such a speed that the driver could not and did not control them as he reached the crossing and saw the approaching car.

There is some evidence that might be held to justify one or the other of these hypotheses. Thus Mesbauer, the driver of the engine, testified in his direct examination, "I was going to the fire just as I always do, and when I got to 51st street I happened to see this car and I see that I couldn't make it,—and I could make it, I thought, and I went, and it struck me in the tail end of the engine," which might well by itself be held to show a reckless willingness to take chances knowing them to be doubtful. But the same witness swore just as positively on cross-examination that his horses had practically cleared the track the car was coming on by the time he saw the car, which is entirely inconsistent with such a theory.

The jury had before them seventeen other eye-witnesses of the accident, and heard their testimony. They were properly, carefully and fully instructed as to the duty of the driver of the engine in approaching this crossing to use caution, prudence, vigilance and foresight to avoid collision, and we cannot say that there was any clear preponderance of evidence against the finding of the jury implied in their verdict that the deceased and the driver under his supervision and control were guilty of no contributory negligence.

If the question of the contributory negligence of the deceased was for the jury, so also was that of the appellant company through its servant. It is as to this that the evidence most conflicts. In the several hundred pages of it are diverse statements, from which ingenious and forceful arguments are drawn on both sides.

It is certain, however, that the engine reached the intersection first, and that the car struck it behind its centre.

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Witnesses say that at a distance on Ashland avenue within which it would have been easy to stop the car, they heard the gong of the approaching engine in 51st street and saw the passage of the hose cart preceding the engine. There was evidence tending to show that the motorman was warned of danger, and recklessly treated the warning. There was evidence tending to show that the motorman, at a distance from 53rd street sufficient, if he had proper control of his car, to have enabled him to stop it before reaching there, could and would, had he been as watchful and vigilant on approaching the crossing as his instructions ordered him to be, have seen the engine approaching.

The strength of this evidence and the credibility of the witnesses were for the jury. We cannot say that the finding they made was against the clear preponderance of all the evidence adduced, and the judgment of the Circuit Court is affirmed.

Affirmed.

MR. JUSTICE BALL, dissenting:

The deceased knew the streets that the engine was traversing, for he had ridden along and over them many times. He knew that a double track street railway lay in Ashland avenue, along which the cars of appellant were accustomed to come and go with great rapidity. He knew that 51st street from Marshfield avenue to Ashland avenue was built up on each side, so that, until the engine came within 100 feet of the tracks in Ashland avenue, he could not see north or south along that avenue. He knew that a car coming from either direction might be nearing the crossing at 51st street at the instant the engine should come from that street into the avenue. Yet, knowing these things, and having full control of the engine—for he was the lieutenant in charge—as soon as the horses had made the turn from Marshfield avenue into 51st street he urged them on, saying to the driver, "Keep on going; go on; keep on going." As a result the horses galloped east on 51st street, going faster and faster as they neared the fatal crossing, until their speed was so great that they could not be stopped before they reached the crossing af-

ter the engine had come to a point where the deceased could see north and south along Ashland avenue.

The rights of the engine and of the car at this crossing were equal. Each was bound to use ordinary care to avoid a collision at that point. The conduct of the deceased directly contributed to the happening of this accident. There was a want of ordinary care upon his part. Under all the authorities, where the rights of two parties are equal, and a collision occurs through the contributory negligence of the party injured therein, he cannot recover damages from the other party, even though the latter was also guilty of negligence which directly contributed to the injury. *Aurora B. Ry. Co. v. Grimes*, 13 Ill., 585; *C. & M. Ry. Co. v. Patchin*, 16 Ill., 202; *C. & G. U. Ry. Co. v. Fay*, 16 Ill., 558; *C. & A. Ry. Co. v. Gretzner*, 46 Ill., 83; *Kepperly v. Ramsden*, 83 Ill., 354; *W. Chicago St. Ry. Co. v. Linderman*, 187 Ill., 468; *C. B. & Q. Ry. Co. v. Dougherty*, 12 Ill. App., 192; *City of Alton v. English*, 69 Ill. App., 198; *Chicago C. Ry. Co. v. Canevin*, 72 Ill. App., 84.

Again, the deceased just before and at the time of the accident was violating the ordinance relating to the manner in which engines may be driven to a fire. Our courts have declared that one who is injured while in the act of violating an ordinance cannot recover for such injuries. *Morse v. Sweeney*, 15 Ill. App., 486; *Maxwell v. Durkin*, 86 Ill. App., 257; *U. S. Brewing Co. v. Stoltenberg*, 211 Ill., 537.

It will not do to say that the deceased and his men were responding to an alarm of fire, and therefore they had the right to traverse the streets at a high and dangerous rate of speed. Such is not the law. The streets are for the use of all. Every one passing along them must use due care not to injure another who is lawfully upon them. In the use of our streets there is not one rule for the fire engine, a second for the automobile, a third for the carriage and a fourth for the pedestrian. We are all under the reign of the same law, while upon a public highway, whether we walk or ride, and whether our errand is one of pleasure, of private business, or of public concern. Until the legislature or the common

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council see fit to grant to fire engines "the right of way," they are bound by the same law which governs the humblest vehicle.

For the reasons thus briefly stated, I am compelled to dissent from the opinion of the majority of the court.

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Gen. No. 12,340.

1. *SET-OFF—certainty required of plea of.* The plea of set-off must be of the same certainty as is required in a declaration in an independent suit.

2. *SET-OFF—when plea of, defective.* A plea of set-off is defective which does not contain an allegation of damage suffered, where the set-off is predicated upon a claim of damages.

3. *DAMAGES—what cannot be recovered in action of assumpsit.* In an action of assumpsit there can be no recovery for mere speculative, conjectural or possible profits.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 15, 1906.

DEFREES, BRACE & RITTER, for appellant; GORDON L. GRAY, of counsel.

MOSES, ROSENTHAL & KENNEDY, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

This is an action of assumpsit by appellee to recover a balance due from appellant for certain electric machinery sold and delivered by appellee to appellant. The appellant pleaded the general issue and a plea of set-off. The plea of set-off was demurred to and the demurrer was sustained, whereupon appellant withdrew its plea of the general issue and elected to stand by its plea, and was defaulted for want of a plea. The court assessed appellee's damages at the sum

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of \$391, and rendered judgment for that sum and costs against appellant.

The only question presented by the record or argued by counsel is, whether the court erred in sustaining appellee's demurrer to appellant's plea. Following is the plea:

"And for a further plea in this behalf, the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to it, the defendant, in the sum of seven hundred and fifty dollars.

For that whereas, heretofore, to-wit: on or about the 30th day of January, in the year 1904, the plaintiff in this suit was engaged in the manufacture of electrical apparatus known as generators and motors commonly used for the supply of power in the operation of machinery, and at and before that time the defendant was engaged in the manufacture of chocolate, cocoa, chewing gum and other confections and merchandise, in the city of Chicago, and shortly before said time the power-generating machinery in the plant of the defendant had been destroyed by fire and it had become and was important to the interests of the defendant that it be supplied without delay with a new power apparatus to operate its machinery used in the manufacture of chocolate, cocoa and other merchandise, as aforesaid, and thereupon, to-wit: on or about the day last aforesaid the plaintiff proposed, agreed and undertook to sell and furnish to the defendant and to install and set up on the premises of the defendant a certain electrical apparatus known as a generator and motors, to be used in and about the operation of the machinery of the defendant, and in and about the manufacture of chocolate, cocoa and other merchandise as aforesaid, and the importance to the defendant of having the same done promptly was well known to and understood by the plaintiff, and thereupon, in consideration that the defendant would and did enter into a certain contract with it for the purchase by the defendant from the plaintiff of certain electrical apparatus known as a generator and motors, more particularly described in the contract aforesaid, the plaintiff did promise and agree to and with the de-

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fendant as follows: that is to say, that the plaintiff would deliver all of said apparatus in said contract specified at the place of business of the defendant, to-wit: at 375 East Illinois street in the city of Chicago, in seven weeks or sooner from the date of the acceptance of said contract, and thereupon, to-wit: on or about the said 30th day of January, 1904, as aforesaid, the defendant did accept said contract and undertook and promised to pay to the plaintiff for the generator and motors aforesaid, the sum of \$4,104.00, in manner and form as in said contract specified. The defendant says that the cause of action sued on by the plaintiff in this case and described in the plaintiff's declaration arose out of the execution of the contract aforesaid, and that said cause of action so described in the plaintiff's declaration is a part of the purchase money agreed to be paid by the defendant to the plaintiff for the generator and motors aforesaid. And the defendant says that the plaintiff notwithstanding its promises and agreements aforesaid, did not deliver said apparatus to the defendant at its place of business aforesaid in seven weeks or sooner from the date of the acceptance of the contract aforesaid, but on the contrary neglected and refused to deliver the same for a long period of time thereafter, to-wit: for a period of about twenty days from and after the time fixed for the delivery of the same in and by the contract aforesaid, although the plaintiff well knew that by the delay aforesaid the defendant would suffer injury and damage to a large amount, and would be prevented and precluded during the period of said delay from operating its plant and machinery aforesaid, and manufacturing chocolate, cocoa and other merchandise, as aforesaid, and reaping large gains and profits from the sale and disposition thereof; and the defendant says that afterwards, and when the plaintiff tendered delivery of said generator and motors, the defendant received and accepted same, but notified the plaintiff that in so doing it did not and would not waive its damages for such delay in delivery, and the plaintiff delivered and installed the same after so being notified, and with full knowledge of the defendant's intention to claim damages for such delay.

And thereupon, by means of the premises, the plaintiff became and was liable to pay to the defendant as damages

for the breach of contract aforesaid, a large sum of money, to-wit: the sum of \$750.00, and being so liable and in consideration thereof, the plaintiff promised the defendant to pay the same when it should be requested so to do, and although often requested, the plaintiff has neglected and refused and still neglects and refuses to pay the same or any part thereof. Which said sum of money so due from the plaintiff to the defendant as aforesaid, exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the several supposed promises in the declaration mentioned, and out of which said sum of money the defendant is ready and willing, and hereby offers to set off and allow to the plaintiff the full amount of the said damages, and this the defendant is ready to verify."

To this plea appellee demurred generally and specially, assigning specially the following grounds of demurrer:

"1. That the special plea, as amended, was defective in failing to set out all the terms and conditions of the contract referred to in said amended plea, between the plaintiff and the defendant.

"2. That the same was defective, in claiming as damages for the alleged breach by plaintiff of the contract set out in said plea, loss of profits and gains by said defendant in the sale and disposition of its merchandise.

"4. That the same was defective, in that it showed upon its face, that the defendant, at the time of filing same, had not fully performed the contract set out in said plea as amended, but, on the contrary thereof, was itself in default and guilty of a breach of said contract, for the alleged breach of which by the plaintiff damages were claimed by the defendant.

"5. That the same was bad, in that it failed to sufficiently and properly state any legal excuse for the default and breach, by defendant, of the contract set out in said plea as amended, or any waiver by the plaintiff of such default and breach by the defendant.

"6. That the facts set out in said special plea as amended were insufficient to create any right of action in the defendant to the claim of set-off made by said special plea as amended.

"7. That said special plea, as amended, failed to set out any legal cause of action in favor of the defendant and against the plaintiff."

A plea of set-off is a cross-action, wherein the defendant occupies the position of plaintiff and the original plaintiff the position of defendant, and, therefore, the defendant "must establish his claim as upon a distinct action." *Harber Bros. Co. v. Moffatt Cycle Co.*, 151 Ill., 84, 99. Such being the law, the plea of set-off must be of the same certainty as is required in a declaration in an independent suit. In other words, the same rules, as to sufficiency of averments, must be applied to the plea of set-off as would be applied to a declaration based on the claim set up in the plea.

There is no express or direct allegation in the plea that appellant has suffered any damage or lost any gains or profits by reason of the alleged delay in the delivery of the machinery. Nor do we think it is so averred even argumentatively. After averring the failure of appellee to deliver "for a period of about twenty days from and after the time fixed for the delivery of the same," the plea proceeds thus: "although the plaintiff well knew that, by the delay aforesaid, the defendant would suffer injury and damage to a large amount, and would be prevented and precluded, during the period of said delay, from operating its plant and machinery aforesaid, and manufacturing chocolate, cocoa and other merchandise as aforesaid, and reaping large gains and profits from the sale and disposition thereof." Certainly it cannot be logically inferred from the averment that the plaintiff well knew that certain things *would* happen, that the things did, in fact, happen. We do not think that there are sufficient averments in the plea to admit of proof, over objection, that the appellant suffered damage by the loss of gains and profits. "Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense." 1 Chitty on Pl., 9 Am. ed., sec. 213. And the general rule is, that the pleader must state facts from which the court, assuming the

statement to be true, can deduce the legal conclusion that the party, if plaintiff, has a valid cause of action, or, if defendant, a valid defense.

In the present case the appellant has averred, as a fact, that the delivery of the machinery was delayed about twenty days beyond the time fixed by the contract for delivery; but, manifestly, it cannot be inferred from the mere delay in delivery that appellant suffered damage. It is not averred that appellant had any contract for the sale and delivery of any product of its manufacture which it was prevented by the delay from performing, or that it received any orders which it could not fill, or any offers of purchase, which, on account of its insufficiency of goods on hand, it could not accept. No facts are stated from which the court can reach the legal conclusion that the appellant has a valid claim for loss of gains or profits.

In this and other States there are numerous decisions to the effect that there can be no recovery for mere speculative, conjectural or possible profits; that such are too remote and uncertain to be a basis for recovery. *Green v. Williams*, 45 Ill., 206; *Hiner v. Richter*, 51 ib., 299; *Frazer v. Smith*, 60 id., 145; *Benton v. J. A. Fay & Co.*, 64 ib., 417, 422; *C. B. & Q. R'd Co. v. Hale*, 83 Ill., 300; *Chicago City Ry. Co. v. Howison*, 86 ib., 215; *Hair v. Barnes*, 26 Ill. App., 580; *Consumer's Pure Ice Co. v. Jenkins*, 58 ib., 519; *Brigham v. Carlisle*, 78 Ala., 243.

In *Frazer v. Smith*, *supra*, the court say: "This court has decided, in cases kindred to this, that the measure of damages is not prospective gains, unless there should be shown outstanding contracts to be performed by the machinery to be furnished. There is no averment in the declaration of such, the only averment being that the plaintiffs were deprived of the use of the still for two months, during which time they might and would have manufactured large quantities of alcohol, from which they would have derived great gains. This is all prospective, and too remote to be an element of damages."

In *Benton v. J. A. Fay & Co.*, *supra*, it is held that the

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measure of damages for non-delivery of machinery is the value of the use of the machinery.

Counsel for appellant cites C., C. & St. L. Ry. Co. v. Wood, 189 Ill., 352, in which the court say: "However, counsel for appellant is in error in contending it is the invariable rule that profits do not constitute a measure of damages. When profits are the object and inducement of the contract, and known to both contracting parties so to be, such profits may be proven as the measure of damages for a breach of contract, if susceptible of being proven with reasonable certainty." What is thus said is not in conflict with the prior decisions of the court, cited *supra*. The difficulty with the plea here is, that it fails to aver facts constituting a basis for proof of loss of profits, with reasonable certainty. Appellant's counsel argue, in support of the plea, that the appellee, in failing to deliver at the time fixed by the contract, was first in default. This is not shown by the plea. The plea is that "the defendant did accept and contract, and undertook and promised to pay to the plaintiff, for the generator and motors aforesaid, the sum of \$4,104.00, in manner and form as in said contract specified." For aught appearing in the plea, appellant may have failed in making such payments as were made "in manner and form as in said contract specified," and this may have occasioned the delay complained of.

We are of opinion that the demurrer to the plea was properly sustained, and the judgment will be affirmed.

Affirmed.

Illinois Central Railroad Company v. Esther Fitzpatrick, Administratrix.

Gen. No. 12,365.

1. **SAFE PLACE TO WORK**—*servant may assume that master has furnished.* A servant sent by his master to work at a particular place may act on the presumption that such master has exercised reasonable care in making such place reasonably safe.

2. CONTRIBUTORY NEGLIGENCE—*how question of, determined.* Whether a person who has lost his life through the alleged negligence of the defendant was himself guilty of contributory negligence is, where the evidence is conflicting, a question for the jury to determine under proper instructions from the court.

Action on the case for death caused by alleged wrongful act. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 15, 1906.

W. A. HOWETT, for appellant; J. G. DRENNAN, of counsel.

HUMMER, MURPHY & McDONALD, for appellee.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellee, as administratrix of James T. Fitzpatrick, deceased, recovered judgment against appellant for \$5,000 for causing the death of her said intestate, by its negligence. The suit is for the benefit of the next of kin of the intestate. The case was tried on the declaration, consisting of two counts, to which the appellant pleaded the general issue. No question is raised as to the sufficiency of the declaration, or of variance. The facts are substantially as follows: Near to 74th street, an east and west street in the city of Chicago, and next east of and adjoining the right of way of appellant, there is a foundry belonging to the Skein and Axel Company, which the evidence shows is inclosed by a fence. A switch runs from the main track of appellant into the south part of the yards of the Skein and Axel Company, entering the yards through a gate about sixty feet south of 74th street. The evidence tends to prove that this gate was generally kept locked, though sometimes it was open, and that when appellant's switching crew had occasion to enter the yard with an engine, they had to procure the gate key from the foundry company. There were two tracks inside the foundry yard, the one in question in the case running north from the entrance gate, and parallel with the

main track of appellant. The evidence tends to prove that the foundry people owned the tracks in the foundry yard, but it does not appear from the evidence who constructed the tracks. The evidence tends to prove, without contradiction, that appellant repaired the inclosed tracks at different times, and that it sent its bills for the same to the foundry company. Next east of the north and south track in the yard, and distant from the track from 20 to 24 inches, is an embankment about 4 feet 6 inches in height. This embankment was constructed by driving posts, about 4 by 4 inches in size, into the ground, nailing boards from post to post in the inside of the posts and filling in dirt. The embankment was used for unloading scrap and pig iron on for use in the foundry, and at the time of the accident pig and scrap iron were piled on the embankment. At one place in the embankment one of the posts had been forced out, so that it leaned toward the track at an angle of about 45 degrees. The distance between the top of this leaning post and the body of a car standing on the track opposite it is variously estimated by the witnesses. One witness says 6 inches, another 6 or 8 inches, another 8 or 9 inches. Brennan, foreman of the crew hereinafter mentioned, testified, without contradiction, that the car which caught the deceased had a platform on the end of it, and a sill that projected about 1 or 2 inches farther than the side of the car, and a staple driven into the end of the car which extended out 4 inches and to within 4 or 5 inches of the leaning post.

The appellant had been using the inclosed track for five years next before the accident, taking in and bringing out cars, and during that time the condition of the track and embankment was the same as at the time of the accident. The deceased was 22 years old, about 5 feet in height, weighed about 150 pounds, and was healthy and strong. From the time he was 16 until he was about 21 years of age, he was in the employ of the Chicago, Burlington & Quincy Railroad Company as a telegraph operator. Subsequently, he was employed in the same capacity by appellant. About two weeks prior to July 2, 1902, he was employed by appel-

lant as a switchman, and two days before the accident he was assigned to a switching crew composed of John Brennan, foreman; Mike Huber, locomotive engineer; George Edmunds, fireman, and John Lunney and the deceased, switchmen. July 2, 1902, this crew went to the foundry yards. Before the engine entered the yard, Brennan, the foreman of the crew, told the deceased that they wanted to take out all empty cars. Huber, the engineer, witness for appellant, testified that he went in light, and inside the gate, and before the embankment was reached they coupled onto two cars; that then the deceased walked north on the track, between the track and the embankment, about 50 feet, to couple onto a gondola car, and was then 18 or 20 feet south of the leaning post, and attempted to make the coupling between the gondola car and the car next south of it, but missed the coupling, and then gave him, the engineer, a signal to come ahead, which he did. When the deceased went in between the cars the second time, to make the coupling, he was 10 or 12 feet from the leaning post and the train was moving north between 2 and 4 miles per hour, and when he made the coupling, and stepped out from between the cars, he came in contact with the leaning post. Huber testifies that the corner of the car caught him. Brennan testified that "when the cars came together, he stepped out from between them and came in contact with the leaning post, and the corner of the car caught him between it and the post and turned him right around," that "he was caught between the the post and the car and crushed in the breast." He died as a result of his injuries in about four hours from the time of the accident. The evidence will be further referred to in connection with appellant's contentions.

Appellant's counsel contends that the deceased was guilty of contributory negligence which precludes recovery; that the part of the sidetrack within the inclosure did not belong to appellant and therefore it was under no obligation to repair it, and that certain instructions, given by appellee's request, are erroneous.

The evidence tends to prove that it was light at the time

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of the accident, between 4 and 5 o'clock p. m., and that the view of one walking north, between the track and the embankment, which was the proper place to walk, was unobstructed, and it is contended that had the deceased exercised ordinary care he would have seen the leaning post and could have avoided contact with it. The deceased had been with the crew only two days, and the evidence tends to prove that he had never been in the foundry yard before the day of the accident. Foreman Brennan testified: "He never was on that track before that I know of." Lunney, switchman, testified: "So far as I know Fitzpatrick had not been in there before." There is no evidence that the deceased ever had been inside the foundry yard before the occurrence of the accident. If he had been, it is a legitimate presumption that appellant would have so proved. Neither is there any evidence that the deceased had been informed of the leaning post. Having been sent by his employer to work in that place, he was not required to make an examination for defects, but had a right to act on the presumption that appellant had exercised reasonable care in making the place where he was required to work reasonably safe. *Himrod Coal Co. v. Clark*, 197 Ill., 514, 518; *Ill. Terminal R'd Co. v. Thompson*, 210 ib., 226, 236.

The evidence shows that the deceased had to stand with his face toward the engineer and his back toward the post, to signal the engineer to come ahead, when a coupling was to be made, and so standing he could not see the post, and that after a coupling was made he had to come out from between the coupled cars. Brennan was questioned and answered thus:

Q. "And this man who was down there between the cars and this bank, could see it (the post) plainer than any one else could see it; that is, wasn't he in better position to see it, if he was down between the cars?"

A. "He could see one way when he was working."

Q. "He could see both ways, if he was looking?"

A. "Not if he was attending to his duties."

Q. "Well, a man, at a glance, he could see one way as well as another, couldn't he?"

A. "The man got caught there; that is all I know about it. He could not look both ways, toward the engine to give signs and look backward too."

Q. "If a post was within three feet of a man, there was nothing to have prevented him from seeing this, was there?"

A. "He could not possibly see that post when he got hurt."

Q. "What was there to prevent him from seeing it?"

A. "Because he was holding the lever up, that was attached to the gondola, and when the car struck, they backed up and caught him between the car and the post."

When the train first struck the gondola, as the deceased was attempting to make the coupling which he missed, it drove the gondola car 8 or 10 feet north, and the deceased walked along with it. Huber, the engineer, testified that the time he stepped out in front of the post, was the first time he stepped out from between the cars after he missed the coupling, which, if true, indicates that he followed up behind the gondola car, when it was driven forward by the train the first time, in which case he could not have seen the post after the first impact.

Counsel for appellant cites and comments on C., M. & St. P. Ry. Co. v. Halsey, 133 Ill., 248, and Weeks v. C. & N. W. Ry. Co., 198 ib., 551, in support of the contention that the deceased was not exercising ordinary care. The former case was reversed because of an erroneous instruction. In the latter case, the main question seems to have been whether the finding of facts by the Appellate Court was sufficient. Other cases are cited, which we do not think applicable to the facts in the present case. There can be no question that appellant was guilty of negligence, in continuing to use the track obstructed as it was, and we do not understand counsel as contending the contrary. Whether the deceased was or was not guilty of contributory negligence, was a question for the jury, which was submitted to them by

instructions, and we are satisfied with their finding that he was not.

We regard the contention that appellant could not make the track reasonably safe, because it did not own it, as a very lame excuse. The evidence shows that appellant had repaired the track on several occasions. The sidetrack was for the benefit of the foundry, and there can be no question that the foundry people would have permitted appellant, at any time, to make it safe rather than submit to the alternative of appellant ceasing to operate it. The work to be done was merely to remove the dirt behind the post, straighten the post, and make it firm and secure, and this would have taken a very short time and involved little expense. But, if the foundry people owned the track within the inclosure, this was immaterial. It was incumbent on appellant either to see that it was made reasonably safe, or to cease using it in its unsafe condition. Appellant's counsel substantially admits in his argument that appellant might be liable for negligence in using the track, if defective. In *Ill. Terminal R'd Co. v. Thompson*, 210 Ill., 226, the plaintiff, Thompson, while climbing a ladder on the side of the car, came in contact with a telegraph pole too close to the track, which the railroad company had allowed to be there for about three years, and suffered injury which resulted in his death. The company defended on the ground that another company owned the land on which the pole was and erected the pole. In respect to this defense the court say: "This is an immaterial consideration. The appellant was in possession of the tracks, and of the yard, and was engaged in the operation of its business in switching cars upon such tracks. It makes no difference whether the appellant company owned the premises in fee, or was in possession of them as a lessee or licensee. The appellee was in the employment of the appellant company, and was engaged in the business of helping it to switch its cars in the yards in question with the means furnished to him by the appellant. It was his duty to climb up the side of the car upon the ladder, which was there, and to ascend to

the top of the car to control the brakes thereon. While he was engaged in the performance of this duty, it was the duty of the appellant to furnish him a safe place in which he could do the work required of him. The evidence tends to prove that the appellant knowingly permitted the pole to remain in its position of dangerous nearness to the track." The evidence showed that Thompson had, while on top of a car, passed the pole three times, and it was objected by the railroad company that he was not in the exercise of due care for his safety when he came in contact with the pole. But the court said: "The appellee cannot be charged with contributory negligence, if he did not have notice of the dangerous proximity of the telegraph pole to the track and the cars passing upon the track. There is evidence in the record tending to show that, while the appellee may have seen these poles, which were erected between the north and south tracks in the yard, yet that he had no notice of the fact that the pole, which caused the injury, was not within a safe distance from the north track and from the cars which might pass upon the north track. There was evidence tending to show that this particular pole had swayed towards the track, so that it was nearer than if it had occupied a perfectly upright position." This language is applicable here.

It is certainly not a question of law, on the evidence, whether the deceased knew of the dangerous proximity to the track of the leaning post, or whether he was exercising ordinary care. These questions were for the jury. In *C. & A. R. R. Co. v. Stevens*, 189 Ill., 226, the plaintiff, while descending from the top of the car by a ladder, was injured by coming in contact with the foot-board of a coal chute, which extended to within sixteen and one-half inches of the ladder. He had, while in the service of the company, made several trips past the coal chute, and his train had stopped twice at the coal chute, to take in coal. At the time of the injury he was descending the ladder for the purpose of getting on a flat car, to deliver, by order of his conductor, a message to the engineer to stop at the next station. The

court say: "The fact he was in the performance of a duty which required promptness in reaching the engineer, the facilities afforded him for accomplishing that purpose, the nature of his duties as a brakeman in passing the place, and the fact that he had nothing to do with the use of the coal chute in taking coal when trains stopped there for that purpose, were facts and circumstances proper to be considered by the jury, tending to prove that he did not know and was not chargeable with knowledge of the danger. It is impossible for us to say, upon all this evidence, that he was or was not so chargeable. That was the province of the jury in the first instance, subject only to review by the Appellate Court."

Counsel for appellant says: "I ask the court to note the following instructions given by the trial court, holding that it was negligence of the defendant, Illinois Central, not to go upon the track of the third person or corporation, and put it in repair." No other criticism or comment is made on the instructions or any of them. Then follows instructions 1, 4, 5, 6, 7, 8 and 9, given at appellee's request. Instruction 1 is as follows:

"The court instructs the jury that if you find from the evidence that the defendant, Illinois Central Railway Company, was at the time of the happening of the accident in question, using the switch track upon which said James T. Fitzpatrick was injured, then the said defendant was bound to exercise the same care to keep the said switch track in a reasonably safe condition for said James T. Fitzpatrick as if said switch belonged to said Illinois Central Railway Company."

We think this instruction might, perhaps, have been more accurately worded. Nevertheless, we are not prepared to say that it is not substantially correct, and cannot hold that the giving it was reversible error.

We find no error in any of the instructions 4, 5, 7, 8 and 9.

The judgment will be affirmed.

Affirmed.

John F. Wright v. Jay Somers.**Gen. No. 12,359.**

1. *CONTRACT—to pay fact witness for loss of time, against public policy.* A contract to pay a fact witness for his loss of time occasioned by reason of his having to testify, is against public policy and void.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1905. Reversed. Opinion filed March 15, 1906.

Statement by the Court. Appellant sued a street car company to recover damages for alleged injuries. In the trial he called appellee as a witness. After the trial appellee demanded that appellant pay him \$200 for his loss of time occasioned by said suit and trial. Payment being refused, appellee brought suit, and in a trial in the Circuit Court recovered judgment in the sum of \$200. This appeal followed.

PEASE, SMIETANKA & POLKEY, for appellant.

A. D. GASH and JAMES H. HOOPER, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

The evidence for appellee tended to prove that appellant had agreed to pay him \$200 for his loss of time, whether or not appellant was successful in his suit. That of appellant that he never agreed to pay appellee any definite sum for his services.

The learned trial judge gave the following instruction:

“If the jury believe from the evidence that the defendant agreed to pay the plaintiff, Somers, \$200 for his services as a witness, whether the defendant was successful in his suit or not, then your verdict should be in favor of the plaintiff. But if you believe from the evidence that the de-

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fendant agreed to pay said Somers \$200 if his, Wright's suit should be successful, then your verdict should be for the defendant."

It is inherent in the verdict that the jury found the issues of fact in favor of appellee.

We cannot affirm this judgment. The contract upon which it is based is against public policy. If affirmed, it would give ground for witnesses to extort unreasonable fees for their testimony; and might make it impossible for a poor suitor to obtain his rights.

It is against the spirit of our Constitution, which says: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and *without being obliged to purchase it*, completely and without denial, promptly and without delay." Section 19, Article II.

The legislative department of our State has declared that every witness attending in his own county upon trials in the courts of record shall be entitled to receive the sum of one dollar for each day's attendance and five cents per mile each way for necessary travel. Section 47, chapter 53, R. S. Hurd. This is all the witness is entitled to receive. To demand more is forbidden by the policy and spirit of this statute.

If a witness, who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor, who desires to call him, as to the value of his testimony, and then call upon the courts to enforce the contract thus made, the tendency to evil consequences is apparent. Such a ruling leans toward the procurement of perjury; toward the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts.

We are not charging that any of these dangerous consequences happened in this case. It does not appear but that

appellee when called in the damage case testified simply and purely to the truth. But the affirmance of this judgment would so clearly tend to evil consequences that we must declare the contract upon which it is founded void as against public policy. *Walker v. Cook*, 33 Ill. App., 561; *Gillett v. Board of Supervisors*, 67 Ill., 256; *Dodge v. Stiles*, 26 Conn., 463; *Quirk v. Muller*, 14 Mont., 467.

The alleged contract is without consideration. When subpoenaed one is bound to attend the trial, and there to submit himself to an examination upon the facts in issue.

We are not here concerned with the question of the payment of expert witnesses. As was said by Justice Maule in *Webb v. Page*, 1 Car. & Kirw., 23: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge—without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him."

The judgment of the Circuit Court is reversed.

Reversed.

The Carey-Lombard Lumber Company v. Harry A. Daugherty, et al.

Gen. No. 12,341.

1. **AMENDMENT**—*effect of vacating order permitting.* The effect of vacating an order granting leave to file an amendment is to leave the pleadings sought to be amended precisely as though no leave to file such amendment had been given, and this notwithstanding the amendment was actually placed on file before the order of vacation was entered.

2. **AMENDMENT**—*what ground for refusal to permit.* An unreasonable delay in offering an amendment is good ground for a

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chancellor to refuse to exercise the discretionary power to permit amendment.

3. **NEW CAUSE OF ACTION**—*when amended petition for mechanic's lien sets up.* Where the original petition for a mechanic's lien alleged in substance, that the contractor had completed the building and that the owner had accepted it without either such contractor or owner having paid the petitioner, a sub-contractor, for the materials which he had sold to the contractor for and which had been used by him in the building, an amended petition for such a lien which alleges in substance that the contractor before the building was completed abandoned the same and surrendered it to the owner and that the building was then worth more than enough to pay the claim of the petitioner, a sub-contractor, over and above the then cost of the buildings and any damages sustained by the owner by reason of the non-fulfillment of the original contract for its construction, states a new cause of action.

5. **EQUITY**—*when will follow the law.* Where a complainant in equity had a concurrent remedy at law which is barred by limitation, equity will apply the same rule of limitation and bar him in equity.

Mechanic's lien proceeding. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1905. **Affirmed.** Opinion filed March 15, 1906.

Statement by the Court. August 25, 1892, appellant filed a bill of complaint, alleging that appellant was employed February 2, 1892, by John Leinhart to furnish lumber to build a building on a lot owned by James A. Fullenwider, and was to receive what the lumber was reasonably worth; that it did furnish lumber so required until June 16, 1892, in the amounts and to the value as shown in "Exhibit A," and it was to be paid for on the first day of the next month after deliveries were made; that the building was completed and accepted by Fullenwider; that there remains due \$730.04, by reason whereof it is entitled to a mechanic's lien. That on February 3, 1892, it caused a mechanic's lien notice to be served on Fullenwider, stating that it had been employed by Leinhart to furnish lumber for Fullenwider's building, and that it would hold his interest in the ground liable for the amount to become due, and it alleged that since said time Fullenwider has had more

than sufficient money in his hands due Leinhart on account of said building to satisfy its claim; that Peabody and the unknown holders of certain notes had some interest, but subject to its lien.

Prayer for answer, for mechanic's lien, for sale if decree is not paid, and for summons. "Exhibit A," attached, is an itemized statement of lumber bought, showing \$500 payment and \$730.04 balance due.

The defendants filed a demurrer. Thereupon appellant amended its bill by adding a copy of the mechanic's lien therein referred to. Defendants again demurred. Upon argument the demurrer was sustained and the bill was dismissed for want of equity. An appeal was taken to the Supreme Court, where the decree of the trial court was reversed and the cause was remanded with directions to overrule the demurrer. *The Carey-Lombard Lumber Co. v. Fullenwider*, 150 Ill., 629.

The case was redocketed in the Circuit Court, October 7, 1895. Upon the 19th day of the same month defendants filed a plea to said petition, alleging that there was nothing due Leinhart at time of service of mechanic's lien notice; that thereafter John Leinhart abandoned the alleged contract and refused to complete the same, and that the cost of material and labor paid out by Fullenwider to complete the work, together with such sums as had been rightfully paid out under said contract by Fullenwider, and the damage which he sustained by the failure of Leinhart to complete the contract, amounted to more than the total amount of the contract price, and there did not anything become due to said Leinhart under said contract, and there was not anything due to said Leinhart at the time of filing the bill, and nothing has become due since, nor will anything become due said Leinhart.

The cause then slept until August 11, 1900, when appellant filed a general replication to such plea. No further action was taken in the case until June 27, 1904, when the death of Fullenwider was suggested, and his executors were substituted as parties defendant. An order was entered that

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the plea filed by the deceased stand as the plea of his executors. In this state of the pleadings the trial came on in October, 1904. November 1, 1904, after appellant had closed its proofs it obtained leave to amend its petition instanter. This amendment alleges that after said lumber was furnished, but before said building was fully completed, on or about June 20, 1892, Leinhart abandoned the work on the contract and surrendered it to Fullenwider; and that the unfinished building at the time of its abandonment and surrender was reasonably worth a large sum over and above the aggregate of the amounts already paid thereon and of any damages that may have been sustained by reason of the non-fulfillment of the original contract for the erection of said building, to-wit, a sum greater than the amount due appellant, and that no other persons have or claim a mechanic's lien.

Appellees filed a special demurrer to said amendment. November 10, 1904, upon the hearing of the demurrer the court gave leave to appellees to withdraw the same. This being done, they moved the court to vacate the order of November 1, 1904, permitting such amendment. This motion the court sustained and vacated and set aside the order granting such leave. At the close of the trial the court dismissed the petition for want of equity. This appeal followed.

JAMES H. HOOPER, for appellant.

JOSEPH W. MOSES, for appellees.

MR. JUSTICE BALL delivered the opinion of the court.

The original petition as first amended set up the completion of the building and its acceptance by the owner. These were the allegations under which the evidence was presented. The failure of the testimony to establish these allegations is complete. The preponderance of the evidence showed that Leinhart abandoned the building long before it was completed and left the State of Illinois, never thereafter to return. This variance was specifically pointed out

by counsel for appellees at the close of appellant's evidence. Therefore the decree entered herein was right; unless, first, when the cause was tried and the decree entered the amendment of November 1, 1904, was a part of the petition; or, second, unless the court erred in vacating and setting aside the order of November 1, 1904, giving appellant leave to file said amendment to its petition.

First. Appellant says that while the court set aside and vacated the order granting leave to file the amendment of November 1, 1904, it did not specifically strike the amendment from the files; so that the hearing really took place upon the amended bill as thus amended, with appellees in default as to the last amendment filed.

The answer to this contention is found in section 8, chapter 7, R. S., which says: "No process, pleading or proceeding shall be amended * * * without the order of court, or by some other court of competent authority." Section 9 of the same chapter says: "The provisions of this act shall extend to all actions in courts of law or chancery."

When the order granting leave to appellant to file this amendment was vacated and set aside it then stood as if leave to file it had never been given. Without that leave it could not and did not become a part of the papers in this case, no matter how many times it had been marked "filed" by the clerk of the Circuit Court. A paper thus filed is disregarded by the court. *Roberts v. Stigleman*, 78 Ill., 120.

Permitting a bill to be amended is a matter resting in the sound discretion of the chancellor, and his decision will not be reviewed by an appellate tribunal, unless there has been an abuse of that discretion. *Hewitt v. Dement*, 57 Ill., 502.

In *Hoyt v. Tuxbury*, 70 Ill., 342, the court say: "The objection that the court refused to allow certain amendments to be made after the hearing and final decision of the case in the court below, cannot be assigned for error. Whether the amendment should be made, or not, rested purely in the discretion of the court."

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It is elementary that an application to amend a bill in chancery must be made within a reasonable time after the necessity for such an amendment is or should have been discovered. An unreasonable delay in offering the amendment is good ground for the chancellor to refuse to exercise the discretionary power to permit an amendment. 1 Barb. Ch. Pr. (1st ed.) 207; *Wolverton v. Taylor*, 157 Ill., 485.

The original petition was filed in this case August 25, 1892; amended November 28, 1892; redocketed in the Circuit Court, October 7, 1895; twelve days later the defendants plead the abandonment of the contract by Leinhart; nearly five years later appellant filed a general replication to this plea; four years from the last date the cause is called for trial; and then, and not till then, an amendment was filed, which sets up the matter contained in the plea mentioned. In other words, appellant suffered nine years to pass before it ascertained the fact that the allegation in the bill was false and that contained in the plea was true. Under these circumstances it was not an abuse of his discretion for the chancellor to vacate and set aside the order of amendment dated November 1, 1904, as improvidently made.

There is another reason why the court was justified in vacating such order. The original petition, and as amended up to the time of the trial, was that Leinhart, the contractor, had completed the building, and that the owner had accepted it, without either of them having paid appellant for the materials which as subcontractor it had sold to the contractor for and had been used in the building. Out of these facts a lien arose under section 29 of chapter 82 R. S., as then in force.

The facts set forth in the amendment of November 1, 1904, were that Leinhart, before said building was fully completed, abandoned the same and surrendered it to the owner, and that the building was then worth more than enough to pay the claim of appellant over and above the then cost of the buildings and any damages sustained by the

owner by reason of the nonfulfillment of the original contract for its construction. Under these facts a lien is given by section 45 of the same act. These are different grounds of recovery, distinct from each other, and dissimilar, having this only in common, that, if a recovery is had upon either set of facts, a lien follows. *Milliken v. Whitehouse*, 49 Me., 527.

The amendment of November 1, 1904, stated a different cause of action from that alleged in the petition, which was filed twelve years before. It came too late. Courts of equity have always discountenanced laches and neglect, and this without reference to the existence or to the lack of limitations in actions at law. *Angel on Lims.*, 21; 1 *Beach Mod. Eq.*, Sec. 20. In those courts laches have the same effect as have statutes of limitations at law; or, to state it differently, equity follows the law, or acts in obedience to it; and wherever the laches in a cause in equity are so great that, if the case were at law, the limitation acts would apply, equity will enforce a like rule. *Reynolds v. Sumner*, 126 Ill., 72; *Gordon v. Johnson*, 186 Ill., 31.

By section 37 of the Lien Act in force in 1892, the subcontractor is given the election to file a petition in chancery or to bring an action at law against the owner and the contractor. If he had chosen to sue at law, section 15 of chapter 38, R. S. Hurd, limiting all civil actions not herein otherwise provided for to five years from the time they accrued, would apply. The rule that where the remedies are concurrent, and the claim is barred at law, equity, in obedience to the statute, will refuse a remedy, is too well understood to need the citation of authorities for its support. It follows that this new cause of action having been presented for the first time more than five years, namely, twelve years, after it accrued, the chancellor was fully justified in refusing to permit this amendment to be made.

The decree of the Circuit Court is affirmed.

Affirmed.

Alice G. Fleming, Trustee, v. Henry C. Ross.

Gen. No. 12,327.

1. *PARTNERSHIP—how suit against, must be brought.* In this State all partners to a partnership obligation should be joined.

2. *PARTNERSHIP—when judgment against co-partner discharged.* Where the holder of a partnership obligation sues and recovers judgment against one of several co-partners, he thereby discharges the co-partners unsued from such obligation, notwithstanding they may be non-residents of the State.

Action of assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 15, 1906.

Statement by the Court. December 2, 1901, appellant brought an action in assumpsit against Henry C. Ross, Alexander H. Seelye and D. Flanner, but obtained service upon Ross only. The declaration counted upon two promissory notes executed December 27, 1890, at Wausau, Wisconsin, by the three defendants by the name of Flanner, Seelye & Ross, payable at Wausau to the order of P. B. Champagne; one for the sum of \$4,332.33, due in one year from date, and the other for the sum of \$4,332.32, in two years from date, each bearing interest at the rate of 8 per cent. per annum. After various pleas, including the general issue, were filed, the declaration was amended. Thereafter and on October 13, 1902, Ross filed an additional plea alleging that the notes declared on in the declaration were given for a partnership indebtedness of the then firm of Flanner, Seelye & Ross, and that said partnership was composed of the defendants herein, D. Flanner, Alexander H. Seelye and Henry C. Ross, and that each of the notes was signed in the firm name of Flanner, Seelye & Ross, and not in the individual names of the members of the firm, and that after the giving of said notes, the plaintiff, under

the name and style of Alice G. Fleming, trustee, impleaded the said defendant, Alexander H. Seelye, in the Circuit Court of Cook county, Illinois, in the October, 1895, term of said court, in the year 1895, in a certain plea of trespass on the case on promises, to the damage of the plaintiff of \$10,000, for not performing the very same promises in said declaration mentioned, and that such proceedings were thereupon had, that thereafter, at the November, 1895, term of said court, by the consideration and judgment of said court, the plaintiff recovered against the defendant Seelye, the sum of \$8,061.31 damages as well as costs of the plaintiff in that behalf, whereof the said Seelye was convicted, as by the record thereof still remaining in said court will more fully appear, and that said judgment remains in full force and effect, as the defendant was ready to verify by the record.

To this plea appellant replied: That the said defendant, Henry C. Ross, and the defendant, D. Flanner, at the time of the commencement of said action in said additional plea mentioned, and at all times thereafter to and including the time of the rendition of the judgment in said plea mentioned, were not residents or inhabitants of or domiciled in the State of Illinois, or in the county of Cook within said State, but during all of said time the said defendant, Ross, was a resident and inhabitant and domiciled in the State of California, and was not during said time, or any part thereof, within the jurisdiction of the Circuit Court of Cook county, Illinois, being the court in which the judgment in said plea mentioned was rendered, or subject to service of process issuing therefrom, and that said defendant, Ross, became a resident and inhabitant of said county of Cook in said State, and domiciled therein, after the date of the rendition of said judgment in said plea mentioned, and not before, and that the judgment in said plea mentioned is wholly unpaid and unsatisfied.

To this replication Ross filed a general demurrer.

January 7, 1905, a judgment order, reading as follows, was entered:

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"This cause being called for trial, come the parties to this suit, by their attorneys respectively, and said cause having heretofore, on the stipulation of the parties herein, been submitted to the court for trial without a jury, the court now hears all the evidence, oral and documentary, adduced by the respective parties upon the issues joined by the pleadings, and it appearing to the court that the court heretofore, to-wit, on the 25th day of November, 1904, sustained the general demurrer filed by the defendant, Henry C. Ross, to the first replication of the plaintiff to the first additional plea of the defendant, Henry C. Ross, filed October 13, 1902, to the declaration as amended herein; and that the plaintiff on said date elected to stand by said first replication;

"And the court now having heard the arguments of counsel, and being fully advised in the premises, finds that said first additional plea of the defendant, Henry C. Ross, filed October 13, 1902, to the declaration as amended herein, and the judgment therein set forth, constitutes a bar to the cause of action of the plaintiff set out in said declaration as amended.

"Therefore, it is considered by the court that the plaintiff take nothing by her said action, and that the defendant, Henry C. Ross, go hence without day and do have recovery of and from the plaintiff, his costs and charges in this behalf expended, and have execution therefor."

This appeal was then perfected.

MOSES, ROSENTHAL & KENNEDY, for appellant.

ARTHUR HUMPHREY, for appellee.

MR. JUSTICE BALL delivered the opinion of the court.

Appellant says: "The sole question, therefore, presented by this record for review is the propriety of the action of the trial court in sustaining the general demurrer of appellee to the first replication of appellant to the first additional plea of appellee to the declaration as amended, and its action, in pursuance thereof, in rendering judgment in favor of appellee and against appellant?"

Appellee presents the issue in the following language: "The question now before this court is, does the judgment obtained against Seelye *alone*, in the suit where he *alone* was made party defendant, constitute in law a bar to a second recovery upon the same cause of action in a suit against all three partners, or does the fact that Ross was not a resident of the State of Illinois prevent the application of the well known rule that a former recovery against one of joint obligors constitutes a bar to a recovery against the other joint obligors?"

Section 3, chapter 76, R. S. Hurd, declaring joint obligations to be joint and several, does not apply to partnership obligations. In *Sherburne v. Hyde*, 185 Ill., 580, the Supreme Court say at page 583: "But as we there held (*Sandusky v. Sidwell*, 173 Ill., 493), section 3 of chapter 76 of the Revised Statutes, declaring 'all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants,' has no reference to contracts of a copartnership. (*Coates v. Preston*, 105 Ill., 470.) In other States, by statutes, suits may be brought against one of several partners on a partnership contract. But not so in this State. Here all ostensible members of the copartnership must be joined. (*Page v. Brant*, 18 Ill., 37.)"

At common law in an action brought upon a joint contract, all of the joint obligors must be made defendants, and as to those defendants not served, the plaintiff is obliged to outlaw them before he is permitted to proceed against those who are served. It was found that in the United States, under this rule, joint obligors, by residing in different States, could practically prevent any recovery upon their joint contracts. To remedy this defect the legislature as early as 1845 enacted what is now section 9 of the Practice Act, which reads: "If a summons or *capias* is served on one or more, but not on all the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom process is served, and the plaintiff may, at any time afterwards, have a summons, in the nature of *scire facias*, against the defendant not served

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with the first process, to cause him to appear in said court and show cause why he should not be made a party to such judgment," etc. In no other way has the common law rule been changed in this State. "A plaintiff cannot, in any case, bring his action against more than one and less than all of his joint debtors, but under this statute he may sue all, whether partners or not, and take judgment against as many as are served or who appear, and the rest may be made parties to the judgment by summons in the nature of *scire facias*." *Sherburne v. Hyde*, 185 Ill., 584.

In this case appellee in bringing her action against Seelye alone followed neither the common law rule nor the procedure laid down in said section 9. By taking judgment in that action she merged the joint contracts upon which she sued in the judgment, and thereby precluded herself from afterwards enforcing the same contracts against appellee.

But it is said that where joint obligors reside part in the State and part outside of the State in which suit is brought, to prevent a failure of justice and from necessity, it is permissible to proceed against those residing or found in the State without affecting the liability of the non-resident and non-served joint obligors (*Yoho v. McGovern*, 42 Ohio St., 16); and that under this exception, or rule, appellee is liable in the present action. In this State the reason for this practice is wanting, and therefore such practice is not in force with us. When appellant sued Seelye alone she had an equal right to have sued all of the copartners; but she elected not to do so, and is bound to accept the consequences flowing from her election. These conclusions are supported by *Wann v. McNulty*, 2 Gilm., 359; *Davidson v. Bond*, 12 Ill., 85; *Thompson v. Emmert*, 15 Ill., 416; *Evans v. Gill*, 25 Ill., 116; *Travellers Ins. Co. v. Mayo*, 170 Ill., 501; *Sherburne v. Hyde*, 185 Ill., 585.

The judgment of the Circuit Court is affirmed.

Affirmed.

Lillian E. Calkins, Executrix, v. J. Warren Pease et al.**Gen. No. 12,343.**

1. **CONTRACT**—*how doubtful language of, construed.* In construing contracts which contain provisions or language in any degree ambiguous, courts may and should take into account the circumstances under which the contract was made.

2. **CHAMPERTY**—*contract held not tainted by.* A contract set out in this opinion construed and held not to provide for the payment by an attorney of any portion of the costs of the litigation contemplated and that therefore it was not champertous.

3. **DURESS**—*contract held not obtained by.* Held, under the facts and circumstances of this case, that a contract for fees made between attorney and client was not obtained by duress.

Bill in nature of bill of interpleader. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1905. Reversed and remanded with directions. Opinion filed March 15, 1906.

ERIC WINTERS, for appellant.

PEASE, SMIETANKA & POLKEY, for appellees.

MR JUSTICE BROWN delivered the opinion of the court. This appeal was taken by J. Vernon Calkins and Alfred L. Jones from a decree of the Circuit Court of Cook county rendered after hearing on a bill of complaint in chancery in the nature of a bill of interpleader brought by J. Warren Pease against J. Vernon Calkins, Alfred L. Jones and Henry T. Helm, an amended answer of Calkins and Jones and an answer of Helm, to this bill, with replications thereto, an amended cross-bill of Calkins and Jones, making the other parties to the original bill and the Hartford Deposit Company, defendants, and answers thereto of Pease and Helm and the Hartford Deposit Company, replications to said answers, and evidence adduced in open court. The decree finds that Pease holds \$3,900 (less \$550, heretofore

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paid to Calkins and Jones), which was collected from the Hartford Deposit Company in the case of J. Vernon Calkins and Alfred L. Jones v. Hartford Deposit Company in settlement of the judgment in the said case, and that J. Warren Pease had full authority to collect and receive the same for the benefit of the parties to this suit; that a certain contract in evidence (hereinafter set forth) entered into January 31, 1900, is illegal and void and cannot be sustained in law or equity; that certain claims of Helm arising out of services performed for Calkins and Jones in the case of Louisa Thompson v. Jones and Calkins cannot be recovered upon in this suit; that the services rendered in the case of J. Vernon Calkins and Alfred L. Jones v. the Hartford Deposit Company were rendered by Pease and Helm on a contingent basis; that Helm and Pease are entitled to recover for said services upon a *quantum meruit* and that their services were reasonably worth \$1,460, and that the balance of the fund in the hands of the receiver (J. Warren Pease, the complainant, having been appointed receiver of the fund pending the litigation) shall be paid to J. Vernon Calkins and Alfred L. Jones after deducting the sum of \$550 heretofore paid to them under order of the court.

The decree then recites that the court reserves for further consideration, if it shall be necessary, the question of the division of \$1,460 between Helm and Pease, but orders the receiver to pay to the said Helm and Pease the sum of \$1,460 from the fund in his hands, and to pay to said Calkins and Jones the balance of said fund after deducting the sum of \$550, together with the interest that has been or may be collected on said sum of \$3,900. Each party is then decreed to pay his own costs.

Helm and Pease also prayed appeals to this court, but have filed no records here. They have, however, as appellees severally assigned cross-errors in the record in this appeal, and it is to be presumed will dispose of their appeals here if it is necessary to proceed below in their own interest.

Pending the appeal here Calkins died and his executrix suggested his death, entered her own appearance as executrix,

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and also suggested and produced evidence of an assignment by Alfred L. Jones to Calkins before his death of all his interest in said cause and the proceeds and outcome thereof. An order was thereupon entered that the cause in this court be continued and carried on in the name of Lillian E. Calkins, executrix of the last will and testament of J. Vernon Calkins, deceased, as appellant in the place of J. Vernon Calkins and Alfred L. Jones.

The contract of January 31, 1900, adjudged by the decree to be illegal and void, is as follows:

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vs.
Hartford Deposit Co. }

It is agreed that in case the judgment of the plaintiffs in the above cause shall be affirmed by the Supreme Court, H. T. Helm shall receive on account of said judgment from the said defendant the sum of \$1,200, from which he shall pay Lynn Helm one hundred and fifty dollars for his services in said matter, and shall also pay John B. Brady for the services by him rendered in the same; and that all of the residue, including interest on the entire judgment and costs collectable, shall be received by and belong to the plaintiffs, and this shall be a settlement of all moneys by H. T. & L. Helm received from said Calkins and Jones on account of said case. In case said judgment is reversed, said plaintiffs agree to assign one-half of the claim to said H. T. Helm and he agrees to conduct the further contest thereon for one-half of whatever damages may be recovered, and shall divide equally with the plaintiffs all expenses of such further contest.

H. T. HELM,
J. VERNON CALKINS,
ALFRED L. JONES."

It appears by the record that this contract was declared illegal and void by the chancellor because of one or both of the objections made to it in the amended cross-bill of Calkins and Jones, in which it is attacked both as champertous and as extorted by an attorney from his client by moral duress

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and unconscionable conduct made possible by his employment.

We do not think the contract properly construed is champertous. In construing contracts which contain provisions or language in any decree ambiguous, courts may and should take into account the circumstances under which the contract was made. Thus only will the language be understood in the sense intended by the parties. *Turpin v. B., O. & C. R. R. Co.*, 105 Ill., 11; *Wilson v. Roots*, 119 Ill., 379.

The circumstances at the execution of this contract were these: Calkins and Jones owned a hotel on Dearborn street in Chicago next to a lot where the Hartford Deposit Company was erecting a building. The Hartford Deposit Company opened walls and, as was alleged by Calkins and Jones, damaged some apartments in their hotel. Thereupon Calkins and Jones retained Helm & Helm, a firm of lawyers consisting of Henry T. Helm and Lynn Helm, to collect damages from the Hartford Deposit Company. After sending the company a statement of a claim for \$3,358, and being refused payment, Helm & Helm brought suit in the Circuit Court. Lynn Helm afterwards left the city permanently. H. T. Helm first proceeded with the prosecution alone. He engaged one J. B. Brady, a lawyer of Chicago, to assist him in the trial, however. The trial in the Circuit Court resulted in a verdict in favor of Calkins and Jones for \$4,029, but the trial judge required a *remittitur* of \$629, and judgment was entered for \$3,400. Thereupon the defendants appealed to this court, and the Branch Appellate Court, on the ground of an erroneous modification of an instruction in relation to damages, required a *remittitur* of \$1,000 as a condition of affirming the judgment. The plaintiffs remitted that amount and the defendant appealed to the Supreme Court.

The amount and not the validity of the claim was disputed in the Appellate Court, and on the appeal to the Supreme Court it was claimed on the one side that it was impossible to cure by *remittitur* an error which might have had such indefinite results, and on the other, that the instruction was

not erroneous and that the *remittitur* should not have been required.

Up to this time Calkins and Jones had paid all the court costs and expenses, but had paid their lawyers \$30 only. Helm testifies that from the beginning it was understood that his fee was to be contingent, and should be one-half of the amount recovered. At all events the contract hereinbefore set forth was then executed. It seems to us that under these circumstances a tenable and reasonable construction of the contract makes it mean only that at the conclusion of the litigation, Mr. Helm was to have one-half the fund, whatever it was, which should be collected, after that fund had been depleted by taking out any further costs or expenditures which it might be found necessary to make, in consideration of which Helm agreed to furnish all further legal services required to the end of the litigation. The words, "shall divide equally with the plaintiffs all expenses of such further contest," did not necessarily mean that Helm agreed to advance any portion of the costs. They merely meant, in the light of what went before in the contract, that he was not to have for fees half of whatever sum be finally recovered, but only half of that sum less expenses. Jones and Calkins and Helm seemed to have understood this to be the meaning, because Jones and Calkins continued to pay all the costs and expenses. A contract for a contingent fee is not champertous in Illinois, and as this contract does not, in our opinion, provide that the lawyers should pay the costs of the litigation, we see no reason for condemning it as champertous.

But it was and is claimed by appellants that the contract was extorted from them by Henry T. Helm in their necessities by a kind of moral duress, and by virtue of his confidential relations as their counsel. They claimed that Helm threatened to leave them without counsel in the Supreme Court or time to secure it if they did not sign it, and so, Jones says, "We signed it against our better judgment, but had nothing else to do."

It is remarkable, if this was the case, that no objection should have been made to the agreement by the appellants

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until they filed their amended cross-bill in this case, almost four years after the agreement was executed. After it was made, the Supreme Court, on the ground that the modified instruction on damages was too favorable for the plaintiffs, reversed and remanded the cause for a new trial. The Supreme Court agreed with the Appellate Court that the instruction was erroneous, but thought that it was impossible to tell how much of a *remittitur* would cure the error. The case was redocketed in the Circuit Court and brought to trial before Judge Burke in the summer of 1901. In that trial the liability of the defendants was altogether disputed, and on the ground of surprise to the plaintiffs the court permitted the withdrawal of a juror and then continued the cause. During the preparation for the trial a letter was written by Calkins to Jones, which tends to show that Calkins was not then questioning the obligation of the contract.

The case came up for trial again before Judge Clifford in May, 1902, and a verdict and judgment were obtained by the plaintiffs for \$3,750. The defendant appealed to the Appellate Court, by which in November, 1903, the judgment was affirmed. Then a settlement was made by the counsel acting for the plaintiffs, and a little less than the face of the judgment with interest and costs was taken. This was objected to by Calkins and Jones, and Helm moreover claimed a construction of the contract which would have charged to the fund before division, payment for the services of Mr. Pease, a lawyer who through Helm's procurement and with assistance by Helm through correspondence, tried the cause in the Circuit and Appellate Courts at the last trials. Calkins and Jones contended—in which contention we agree with them—that this was not a proper construction of the contract. The contract meant that Helm for his contingent fee should see that all necessary legal services were given to the plaintiffs until the end of the litigation, and we have no doubt that the retainer and payment of Mr. Pease should come out of Helm's share of the fund.

But it was a question of the construction and not of the validity of the contract which the appellant raised when these

differences arose. Although Mr. Calkins testified in this case that he told Mr. Pease before the latter's bill was filed that he and Jones would repudiate the contract, yet as a matter of fact, in answer to the bill and in the original cross-bill filed January 7, 1904, the appellants set up and relied on the contract, asking only a construction of it favorable to their contention. February 25, 1904, they amended the answer and cross-bill, and attacked the contract as extorted from them.

Mr. Helm denied the statements of Calkins and Jones in relation to the circumstances under which the agreement was signed, but even assuming that Calkins and Jones were correct in their version of the facts, and that the agreement was within the purview of a rule concerning such contracts which render them voidable at the option of the client exercised within a reasonable time, we do not think that appellant can take advantage of it now. When the case came back from the Supreme Court in 1900, the plaintiffs were certainly not under the moral duress which they now complain existed just before the case was heard in the Supreme Court. They should have then disavowed the contract if they held it unwarrantably extorted from them, insisted on a proper settlement with Helm and, if necessary, secured other competent counsel.

They should not have gone on with the case under circumstances which they knew involved the belief of Helm that the contract was obligatory, until a favorable result was reached, and then repudiate it.

The trial court by its decree showed that in the conflict of evidence it held that Pease had the authority given to him to settle the judgment after it had been affirmed in the Appellate Court the last time, with an abatement of a portion of the interest. We see no reason to differ from this finding. But because we consider the written contract introduced in evidence valid, we reverse the decree and remand the cause, with directions to the Circuit Court to enter a decree as to the distribution of the fund in the hands of complainant in accordance with the terms of the contract and not incon-

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sistent with this opinion. Whatever is allowed complainant Pease is to come from the amount which otherwise under the contract would go to Helm.

Reversed and remanded with directions.

Diamond Glue Company v. Albert Kozlowski Wietzychowski.

Gen. No. 12,249.

1. **ADMISSION OF EVIDENCE**—*when cannot be complained of.* Where an entire line of testimony is stricken out but subsequently such ruling is changed, the court, stating that in his opinion certain portions of such testimony were competent, the party so having moved to strike out has nothing of which he can complain if any of such testimony is competent where he does not make specific motions to strike out the incompetent portions of such testimony.

2. **MEMORANDUM**—*when witness may testify from.* A witness may testify from a memorandum made by him at the time of the occurrence to which he is testifying where he states that at the time he made such memorandum he knew it to be correct, notwithstanding he does not testify as to the occurrence in question from an independent recollection.

3. **RES IPSA LOQUITUR**—*when servant can recover.* Without reference to the technical doctrine of *res ipsa loquitur*, a servant injured while operating an elevator of his master can recover where it appears that such servant was a stranger to the operation of such elevator and it was under the management of the master and the accident was such that in the ordinary course of things it would not have happened if such master had used proper care.

4. **DECLARATION**—*when sufficient after verdict.* A declaration is sufficient after verdict which by intelligible allegations has apprised the opposing party of the cause to be made against him.

5. **PAIN**—*what evidence competent to show.* The testimony of a medical expert that a particular injury would cause pain in the future is competent.

6. **MEDICAL EXAMINATION**—*when Appellate Court will not consider.* The Appellate Court in passing upon the question of the excessiveness of the verdict will not consider a medical examination which has been made after verdict and pending the decision upon the motion for a new trial.

Action on the case for personal injuries. Appeal, from the Circuit Court of Cook County; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the March term, 1905. Affirmed. Opinion filed March 15, 1906.

Statement by the Court. This is an appeal from a judgment for \$2,500 and costs against the appellant, the defendant in the Circuit Court, in favor of the appellee, the plaintiff there. The judgment was on the verdict of a jury in a suit for personal injuries.

The declaration originally was in three counts, but a discontinuance was taken by the plaintiff as to the third count before the case went to the jury. The first count alleges, in substance, that the defendant on March 12, 1904, was operating a glue factory, in which it employed the plaintiff, and in which it operated mechanically, by steam or other power, an elevator for the conveyance of passengers and freight between the various floors; that it was the duty of the defendant to equip and maintain its elevator with good and reasonably safe cables, ropes, chains, appliances and machinery, so that the same would be reasonably safe; that the defendant disregarded its said duty and allowed them to become worn out and defective, so that while the plaintiff in the exercise of due care and caution was rightfully on the elevator a great distance above the ground, the said cables, chains, ropes, appliances or machinery with which the elevator was equipped, broke and the elevator fell to the ground, by means of which the plaintiff was thrown to the floor of the elevator and greatly injured.

The second count also describes the accident, and contains averments that the plaintiff was a common laborer in the factory; that as such common laborer he was not informed and had no knowledge of elevators nor the loading and operation thereof, nor of the dangers incident thereto, of all which the defendant had notice; that it was the duty of the defendant to inform the plaintiff of these dangers, but that it failed to do so; that on the contrary, the defendant's foreman ordered the plaintiff to run the elevator up and down without informing him of the dangerous char-

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acter of the employment, by means whereof, while the plaintiff, in obedience to the commands of the foreman, was running the elevator up and down with all due care, the cable, rope or chain by means of which it was raised or lifted, parted, the elevator fell, and the plaintiff was injured.

The general issue was pleaded by the defendant. A motion for a new trial and a motion in arrest of judgment were denied by the court below before judgment. Upon the argument of said motion for a new trial the trial judge said that unless the plaintiff permitted an examination of his then physical condition by a physician to be selected by the court, the court would award a new trial; whereupon the plaintiff assented to such examination and the defendant agreed to pay the expense of such examination, and the court selected a physician, who made a written report of the result of the examination to the trial judge.

The appellant has in this court assigned as error alleged erroneous rulings of the trial court in the admission and exclusion of evidence, in refusing peremptorily to instruct the jury to find for the defendant at the close of all the evidence; in giving the instructions tendered by the plaintiff; in modifying one of the instructions tendered by the defendant; in not awarding a new trial, and in overruling the defendant's motion in arrest of judgment. The assignments of error also allege that the damages awarded by the jury are excessive; that the trial court improperly received and opened the sealed verdict of the jury in the absence of one of the jurors, and that defendant was improperly deprived of its right to have the jury polled at the time the verdict of said jury was opened and read. Some of these assignments have not been urged here. Those argued are considered in the opinion following.

CALHOUN, LYFORD & SHEEAN, for appellant; ROBERT J. SLATER, of counsel.

J. W. SUTTON, for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

The plaintiff in this case, Wietzychowski, had been for several years in the employ of the defendant, The Diamond Glue Company, at the time of his injuries. During several hours each morning his work was running the freight elevator by the falling of which he was injured. He would take glue stock and material from the basement to the second and third floors in trucks run upon the elevator platform, and bring down whatever was needed below. After his work on the elevator stopped at 11 or 12 o'clock, "the boss" would tell him to do something else, and he would work with "the gang," generally in loading material on the trucks and taking it to the wash mill on the first floor to be washed.

The building at the place where the elevator ran consisted of three stories, and above this a working platform. The elevator consisted of an open wooden platform about six feet by nine, composed of a frame of two by eight timbers, upon which was laid a two inch floor sustained by upright iron side pieces operating in a slide in guide posts at the side of the shaft and being connected at the top by a cross-beam, the entire elevator being sustained by means of a seven-eighths inch wire cable fastened to this cross-beam. Attached to the cross-beam was a spring intended, in case the cable should break, to operate safety appliances called dogs at the bottom of the elevator. The cable extended to sheaves and gear work in the dome of the building over the working platform, then back to the drums on the second floor, which drums were operated by belts and pulleys. The elevator was also supplied with a cable to start and stop it, and was adjusted so that it stopped automatically on reaching either the top or the bottom floor. Glue stock or material to be taken from the first to the third floors was loaded into trucks somewhat smaller in dimension than the elevator platform and about four feet in depth, the trucks were then pushed on to the elevator by appellee and others and hoisted.

On the morning of March 12, 1904, the plaintiff had taken two truck loads of material from the first to the third floor, the first being somewhat smaller and the second about the same size as the third. The third was placed upon the ele-

vator, the plaintiff got upon the platform thereof to ride with the load, pulled the rope to start the elevator, and stood there until after passing the second floor, when the hoisting cable broke, the elevator fell to the first floor, the truck was broken, and part of it striking the plaintiff injured him.

Thus far there is no contention between the parties as to the facts. Those which relate to the alleged negligence of the defendant, bringing about the accident, and to the extent of plaintiff's injuries are in dispute.

The negligence claimed by the declaration is that the ropes, chains, cables and appliances of the elevator had been suffered to become worn out and defective; and that the foreman ordered the plaintiff to run the elevator, and although the plaintiff had no knowledge of the running of elevators, failed to warn him of the dangers incident thereto.

The evidence to support these claims is first and chiefly the undisputed fact that without warning and with no extraneous cause apparent, the elevator while in passage fell more than a story on account of the breaking of a hoisting rope or cable, which ought to have been, but was not, strong enough to hold it, and that the so-called "dogs" with which the elevator was supplied did not act. These "dogs" were automatic devices which if they are working properly are thrown out in case the cable breaks, and gripping the slides in the guide posts stop the elevator, or at least materially break the fall. It is vigorously argued by counsel for appellant that the breaking of the cable and the failure of the dogs to work, even though with no apparent cause extrinsic to their own condition, are no evidence of negligence on the part of their owner, because this is not a case for the application of the principle "*Res ipsa loquitur*." But without invoking that principle, evidence of the way in which the accident happened and the apparent absence of any efficient cause for the action or non-action of mechanical appliances involved in the accident, other than their defective condition, is proper for consideration in connection with such other evidence of their condition as is produced. *Slack v. Harris*, 200 Ill., 96-113.

While the mere fact that an employe has been injured is not sufficient to establish that an employer was guilty of negligence and *may* have no tendency to show that the injury was the result of negligence on the part of the employer, yet the manner of and circumstances under which an injury was received may furnish proof of such negligence. *Spring Valley Coal Co. v. Buzis*, 213 Ill., 341.

Besides the circumstances of the accident and the statement of plaintiff that the cable was at least five years old, there is in the record bearing on this question of defendant's negligence, in connection with the condition of the elevator appliances, the testimony of William C. Holway, an elevator inspector employed by the city, the testimony of Joseph Tomaszewski, a fellow employe of the plaintiff, and that of Joseph Leonard, an engineer in defendant's employment, of Charles Rabe, another employe, and of W. H. Morehead, the defendant's superintendent.

Holway's testimony as given was, that four days after the accident he saw the safety devices, the dogs, the spring and lever. He said, "They were all rusted and not in working order. * * * I could tell they were not in working order because they were so rusted out. * * * I could see they were out of order entirely. I was not absolutely sure whether they would have worked or not except from the way they looked to me. I told them that on account of the condition in that line of business—there was so much dampness and salt in the atmosphere—that they ought to take great care of their cables and paint all the iron work. Everything was so rusted about the elevator I ordered everything to be painted in the shape of iron around it except the cables, and they should be oiled."

Before so testifying, Holway, after stating that he was an elevator inspector of the city, said that "without referring to memoranda he had no independent recollection of the condition of the elevator, but that he had a memorandum that would refresh his memory about it." He produced and was allowed to read the memorandum, and after doing so swore that he then remembered the condition of the elevator, but

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could not describe it exactly. He then testified as before set forth. On cross-examination he said that the memorandum from which he refreshed his memory was made by him and was in his handwriting, but had been in the custody of the Building Department in the City Hall. The examination and the rulings of the court on the testimony then proceeded thus:

“Q. You say that aside from that memorandum you had no recollection whatever of anything that you saw at the plant of the Diamond Glue Company? A. Well, no; except as I said before, the surroundings, the dampness and all that and the rest that I saw.

Q. But you have no recollection whatever concerning the condition of the safety dogs or the cable or anything else until you looked at that paper? A. No, sir; I did not.

Q. Now, are you relying simply upon the fact that there was a certain statement made on the paper, or have you now an independent recollection of the facts that the cable and dogs were in a certain condition? A. I am relying entirely on this report of mine.

Q. You haven't any independent recollection after looking at that? A. No, sir.

Q. So that you can say that you have a mental picture? A. No, I cannot.

Q. Of what you did see on the day in question? A. I could not say that.

Q. You have no independent recollection, then, concerning it? A. No, sir; I have not.

MR. SHEEAN: I move, then, if the court please, that this entire testimony be stricken out.

THE COURT: The motion is sustained.

And thereafter, upon argument and further consideration, the jury having been excused for the day, the court changed its ruling, and held as follows:

THE COURT: I overrule this motion, because in my opinion certain portions of the evidence should remain in.

(To which ruling of the court the defendant, by its counsel, then and there duly excepted.)

And subsequently, upon the argument to the jury, counsel for plaintiff, by permission of the court, was permitted to

state when he came to any point when he wanted to speak of Holway's testimony, that the ruling of the court excluding all of Holway's testimony was subsequently changed, because the court considered some parts of it were competent."

It is perhaps left in doubt by this record exactly what was before the jury. Counsel for appellant seem to argue that all the evidence of Holway was admitted by the last ruling of the court, and that this was erroneous, if any portion of it was incompetent.

Counsel for appellee, on the other hand, apparently takes the position that the court decided, in the absence of the jury, that a portion of Holway's evidence was competent, after having decided in their presence that it was incompetent and stricken it out, and that thereupon the court, because it was inconvenient to recall the witness, gave permission to the plaintiff's counsel to state to the jury "*by way of argument*" that *certain portions* of Holway's evidence might be considered by them with other evidence in the case, and that in the absence of any exception by the defendant to any portion of the argument of counsel for the plaintiff, and of any exception showing that any specific portion of Holway's testimony was presented to the jury, the presumption is that the jury knew nothing of the restoration of any part of the evidence and ignored it because stricken out by the court in their presence.

Neither of these theories seems tenable to us. The original motion, after the testimony had been admitted and the cross-examination on the memorandum had taken place, was "that this *entire* testimony be stricken out." This motion was sustained in the presence of the jury. Afterwards, on argument and further consideration in the absence of the jury, this ruling was reversed, and the court said: "I overrule *this* motion, because in my opinion *certain portions* of the evidence should remain in." If counsel for appellant then objected to certain portions of the evidence as incompetent even if the rest were competent, they should have then made motions directed respectively to those specific portions.

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In the absence of said motions, we think that if any portion of the testimony was competent and should have stood, then there is nothing in the record through which appellant can avail himself of the non-exclusion of other portions, if there were any, which were incompetent.

On the other hand an exception was taken to the overruling of the motion to strike out the entire testimony, and the record expressly states that plaintiff's counsel was permitted to state "when he came to any point where he wanted to speak of Holway's testimony, that the ruling of the court excluding all of Holway's testimony was changed," and this consideration renders appellee's position, as before stated, untenable. In our view, therefore, the whole of Holway's testimony must be considered before the jury, and if there be any material part of it competent, there is no error concerning it shown by the record.

We are not prepared, however, to hold that it was not all competent. Wigmore on Evidence, Sec. 736, note 4, says the use of "a past recollection" (that is the testimony from memoranda which the witness made himself of observations at a time anterior to testifying and of the facts recorded by which he has no present independent recollection, but has a knowledge derived from the fact of his record) "is undoubtedly intended to be sanctioned" in Illinois, although "confusion has existed as to the scope and grounds of the rule." The author groups in his note all the Supreme Court opinions in Illinois, treating of the matter. We think his conclusion on the sanction in Illinois of the use of a memorandum containing "past recollection" correct. The able opinion of Judge Pleasants in *Lawrence v. Stiles*, 16 Ill. App., 489, cited by counsel for appellant, although not binding on us as authority, commends itself in general to our approbation, and we think the learned judge was correct in holding in that case that the testimony which, without an independent recollection, a witness was prepared to give from inspection of his daily figuring book, should have been received. "Although based on the writing and without actual recollection, they were not in the legal sense merely

matter of inference." In his opinion the learned judge speaks of such memoranda as refresh the recollection of a witness so that he can then speak from a present actual and independent recollection, in which case the character of the writing is immaterial, and of other memoranda where such a recollection is not required, its place being supplied by what is deemed equivalent as a ground of assurance and accepted from necessity to prevent a failure of justice. "Thus, where a writing is an original, made at or about the time of the occurrence, and the witness recollects that he has seen it before, and that when he saw it he knew the contents to be correct, his testimony to the fact itself is received as if it was based on actual recollection, for his knowledge of it is thereby shown to be actual and certain as well, though inferentially, as if it were so based," is his language, and he quotes with approval from Hare & Wallace's notes on Smith's Leading Cases a statement justifying the admission of testimony "where the witness after referring to the paper undertakes to swear positively to the fact, yet not because he remembers it, but because of the confidence he has in the paper."

In this case the memorandum was an original in the handwriting of the witness—made by him. He swore positively as to the facts after producing and looking at the memorandum, and in direct examination said that after having read it he remembered the condition of the elevator. Counsel for appellant contend that this testimony was incompetent because on cross-examination the witness said that he was relying entirely "on this report of mine," and that aside from that he had no recollection of what he saw "except as I said before, the surroundings, the dampness and all that and the rest I saw," and that he couldn't say that he had a mental picture of what he saw on March 16, 1904, and because the witness did not state whether the memorandum was made at the time of the inspection or shortly prior to the giving of his testimony, nor whether he knew it to be full, true and correct when he made it, nor whether he made it in the line of his duty.

We do not think the appellant is in a position to make

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this objection to the want of a description of the memorandum.

The witness testified that he was an inspector employed by the city of Chicago in the building department; that he went over to the Diamond Glue Company on March 16, 1904, four days after the accident; that he had a memorandum in his own handwriting, which had been in the custody of the building department ever since he made it, which would refresh his memory about it; that he was relying on it "as a report," and after seeing it could testify as to the condition of the elevator on March 16th. There was certainly a very legitimate inference to be made from this testimony that the memorandum was made at the time or about the time he inspected the elevator and in the line of his duty.

The appellant's counsel objected to the witness stating when he produced the memorandum, what it was, and when counsel for plaintiff told the court that it was a part of the records of the city, he objected again. The court then said, "The defendant has raised no objection to the memorandum itself," and the counsel for plaintiff desisted from further questioning concerning the character of the memorandum, saying "Very well." Although after this the counsel for appellant cross-examined the witness carefully as to his lack of independent recollection, he placed his entire objection to the testimony on that point, and on the length of time between the accident and the examination, and made no inquiries as to the nature of the memorandum, nor indicated in any way that he dissented from the evident suggestion of the court that the memorandum was in itself admitted to be of the nature which could furnish an assurance to the witness of "a past recollection."

The testimony of Joseph Tomaszewski is that he had notice that "the rope was rough" before the day of the accident; that it was in such a condition that "anybody could see it was out of order;" that he had looked at it two or three months before the accident, and that "it was very bad and everybody said that it would soon break." This witness

testified through an interpreter. He was not cross-examined as to the character of the roughness, nor what he more particularly meant by its condition being "bad" or "out of order," or what led him to the conclusion it would soon break.

Leonard testified that he thought he had oiled the cable on the morning of the accident and thought it was safe; that he never saw a broken strand in it until it broke; that it broke about the middle, near the roof.

Morehead testified that standing on the third floor a week or ten days before the accident, while the cable was in motion, he put his fingers on it and allowed the cable to pass through them to see whether it was sound and right, and he considered it safe—that no cable is smooth, but that there were no loose ends, nothing that was ruptured or broken that he could discover—no broken wires.

It is manifest, however, from the construction and position of the cable that he could not have passed through his hands the cable where the break occurred—indeed, not more than 15 feet of the cable could in that position have passed through his hands if he felt it during its entire travel.

Rabe testified that while he did not inspect the cable, he went on the elevator pretty nearly every day, and always then looked at the cable; that the cable looked smooth, there was no grease on it, that he never saw any strands or sticks or wires sticking out of it.

If Holway's testimony was properly before the jury, there can be no doubt that this evidence was sufficient to support the charge that the elevator appliances had been allowed to become defective by the defendant, and that the accident happened because of this. Even without Holway's testimony, we think there was quite enough to go to the jury and enough to sustain the verdict when rendered. It is not contended indeed that if the plaintiff had been a mere passenger upon the elevator the defendant might not have been held liable under the doctrine announced in the *Hartford Deposit Co. v. Sollitt*, 172 Ill., 222, and *Springer v. Ford*, 189 Ill., 430, and other cases, that the owner and operator of an elevator is held to the highest degree of care and diligence

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for the safety of those carried, but it is urged that as the plaintiff was a servant of the defendant, no probative force whatever can be attributed to the fact that the cable broke and the checking appliances failed to work as indicating negligence on the part of the defendant. This is not reasonable and is not the law. The invariable presumption in favor of a passenger, which puts the burden on a common carrier to prove the fact that any accident occurring did not occur through his negligence, does not exist in favor of an employe, it is true, but nevertheless, as pointed out by this court in *Fairbank Canning Co. v. Grimes*, 24 Ill. App., 34, and in *Armour v. Golkowska*, 95 Ill. App., 492, it frequently happens that it is enough to make a *prima facie* case of negligence in favor of such an employe that "the thing causing the injury was under the management of the defendant or his servants and the accident was such that in the ordinary course of things it would not have happened if those having the management used proper care."

In *Brimmer v. I. C. R. R. Co.*, 101 Ill. App., 198, Mr. Justice Freeman in the Branch Appellate Court of this District, distinguishing that case, said: "There are cases in which it is evident without the aid of legal distinctions that the mere fact of the occurrence of an accident indicates negligence on the part of those responsible for its cause. In such cases the accident speaks for itself. In other words, the accident is one which in the ordinary course of events without some absence of due care ought not to happen, and when it does happen the burden is put upon the party responsible for such care to show, if he seeks to escape liability, that it was not the result of his negligence."

Cases of this kind may occur as well when the plaintiffs are employes of the defendant as when they are not, and of such cases the one at bar is an example. The plaintiff was a common laborer under the orders of a foreman, and although for a part of each day his work consisted of taking loads up on the elevator, he had no duty of inspection incumbent on him and no opportunity to perform it. There was a duty binding the defendant to see to it that the place

and appliances where and with which, respectively the plaintiff had to work were in reasonably good order and safe, and there is enough in this record to warrant the findings which, considering the instructions of the court, inhered in the verdict of the jury, that the elevator on which plaintiff was injured was not reasonably safe; that the defendant had notice or knowledge thereof, or ought to have had; that the plaintiff did not know that said elevator was unsafe, and had not equal means of knowing it with the defendant, and that the plaintiff exercised the care and caution which would have been exercised under like circumstances by a reasonably careful man to avoid injury, and that a want of such care and caution on his part did not proximately contribute to the injury. See *Union Pacific Railway Co. v. O'Brien*, 161 U. S., 451; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I., 204; *Swanson v. Great Northern Ry. Co.*, 68 Minn., 185.

The second count of the declaration charges negligence in ordering plaintiff to run the elevator without informing him of the dangerous character of the employment. The evidence to support this is that which tends to show that the foreman, Rabe, knew that the elevator was very much overloaded, while the defendant, not knowing its carrying capacity, was not aware that it was thus dangerously overweighted. We think that if there were satisfactory proof of these matters it would sustain the allegations of the count. The defendant by its foreman, in such case, must be held to have known a serious latent danger unknown to the plaintiff and of which it was its neglected duty to warn him. *Sullivan v. Thorndyke*, 175 Mass., 41.

It is not necessary, however, in our view of the case to pass on the sufficiency of the evidence under this allegation to sustain the verdict. It is true that as Rabe testified that he knew the carrying capacity of the elevator to be but 4,000 pounds, that may be considered proven. But the evidence that the truck and its contents which plaintiff was carrying on it weighed 8,500 pounds, consists entirely of the statement of the plaintiff in direct examination, and when

cross-examined at to how he made the estimate of the weight he answered only, "I should judge it was very heavy. This stuff was mixed with water and there was a lot of water in it and it was very heavy." This answer certainly throws grave doubt on the value of his testimony as to weight on his direct examination.

It is not necessary for us to discuss the testimony which is by counsel respectively pointed out as pertinent to the question whether the plaintiff assumed the risk. The instructions which were asked by the defendant involving the law on this question directly and indirectly were given, and for reasons which appear in our preceding discussion of the evidence, we see no ground for disturbing the verdict of the jury. It was a matter of argument to the jury—not something to ask the court to find—under the evidence in this case, that plaintiff, although charged with no duty of inspection, must have seen or could have seen what Tomaszewski testified he saw concerning the cable, and what Holway swore he saw about the dogs and spring.

It is insisted that neither the first nor second counts of the declaration is sufficient to sustain judgment even after verdict, and that therefore the motion in arrest of judgment should have been granted. There is no merit in this contention. Both counts are good after verdict, whatever might have been said of them on demurrer.

In the Clausen case, 173 Ill., 100, cited by appellant, and in the Kinnare case, 123 Ill., 280, we think the rules laid down are sufficient to cover this case. The purpose of pleading is accomplished when by intelligible allegations the opposing party is advised of the case to be made against him, and the approved doctrine of Chitty is that in declarations "certainty to a certain intent in general"—that is, "what upon a fair and reasonable construction may be called certain without recurring to possible facts which do not appear," is sufficient. *Grace & Hyde Co. v. Sanborn*, 124 Ill. App. 472.

To say that the plaintiff was an employe of the defendant, that it was the duty of the defendant to make its elevator

reasonably safe for persons lawfully riding on the same, and yet that it so negligently treated its elevator, by allowing its appliances to become defective, that while the plaintiff with due care "was rightfully upon the same it fell," seems to us to state a cause of action, even if defectively or without sufficient detail, and to allow the admission of evidence to supply the statement of what plaintiff was "rightfully" doing on the elevator to bring him within the duty which the plaintiff owed to persons "lawfully riding" on the same. It certainly answers the end of pleading in informing the defendant what it should be prepared to meet. And so too, although less clearly, the second count would be sufficient after verdict if the verdict was based on evidence that the dangers incident to the running of this elevator was that it was carrying 8,500 pounds, whereas it was only constructed to carry four, that the foreman knew this, and the plaintiff did not. *Sullivan v. Thorndyke*, 175 Mass., 41. But as we indicated in relation to the evidence supporting this count, we prefer not to rest our affirmation of this judgment on it. The verdict and judgment are sufficiently sustained by the first count.

The foregoing conclusions leave for consideration only the alleged excessiveness of the damages assessed by the jury and the objections made to the admission of evidence relating thereto.

There was no error in the admission of Dr. Kuflewski's testimony that the injury was painful at the time of the trial and, as permanent, would be in the future. It is by no means true, as argued, that a physician can know only from statements made to him by a patient that an injury is painful. A statement of subjective symptoms is generally required by a physician from a patient, it is true, if the patient is able to give one, and such a statement becomes one of the means of his making his diagnosis, but his expert diagnosis is not to be rejected for that reason. When a physician knows certain objective conditions he can of his own expert knowledge also tell what subjective symptoms the patient

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must have. He might be able properly to testify concerning them without even communicating with his patient.

It would extend this opinion to too great length to discuss in detail the expert testimony and the amount of the verdict in connection therewith. The judgment seems to us large, and undoubtedly the expert witness for the plaintiff showed feeling in the case, concerning which it was proper to argue to the jury, and concerning which counsel probably did argue to the jury, as they have argued to us. But after a very careful consideration of all the medical evidence and the arguments of counsel thereon, we cannot conclude that it is our duty to overthrow the jury's decision concerning the credibility and trustworthiness of the plaintiff and his doctor. We have been cited by both appellant's and appellee's counsel to a report which appears in the transcript of the record, made by Dr. Beavan to the trial judge, of an examination of the physical condition of the plaintiff pending the consideration of the motion for a new trial. We have not considered it, and do not feel at liberty to do so. The law does not provide for expert opinion in this form in judicial proceedings of this kind. Upon the question of whether or not an agreement between counsel and between counsel and the court may have justified the consideration of this report on the motion for a new trial, we express no opinion. Our duty is plain, however, to consider the ruling on the motion for a new trial as though it were made with no other expert testimony before the court than that which the jury heard under oath, and we have done so.

The judgment of the Circuit Court is affirmed.

Affirmed.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1906.

**H. H. Kahl, Administrator, v. Chicago, Milwaukee &
St. Paul Railway Company.**

Gen. No. 4,568.

1. **CROSSING SIGNALS**—*instructions with regard to duty of giving, held erroneous.* In this case a series of instructions is considered and it is held that the jury was improperly instructed with respect to the duty of a railroad company to give crossing signals.

2. **ORDINARY CARE**—*when instruction as to, erroneous.* An instruction which tells the jury that before the plaintiff could recover he must prove by a preponderance of the evidence "that the deceased himself was exercising reasonable or ordinary care and caution upon his part to discover the approaching train and to avoid danger from it," held erroneous as applied to one approaching an unfamiliar railroad crossing.

3. **REPETITION**—*contained in instructions, where harmful, ground for reversal.* The repetition in instructions of a vital proposition of law where apparently harmful is ground for reversal.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Carroll County; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

WOOD & ELMER and DOUGLAS ALLEMAN, for appellant.

GEORGE L. HOFFMAN and CHARLES B. KEELER, for appellee.

Kahl v. C., M. & St. P. Ry. Co.

MR. JUSTICE FARMER delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for the alleged negligent killing by defendant, of his son, Earl J. Kahl. Deceased was a boy not quite fifteen years old. On the 3rd day of April, 1902, he had gone from Brookville, his home, to Shannon, to take an examination held there by the county superintendent of schools. On his way home he was accompanied by two girls, all three of them riding in a top buggy drawn by one horse. The evidence tends to show that they returned by a road not very familiar to Earl. The highway upon which they were traveling was crossed by defendant's railroad track, the crossing being known as Crabtree's Crossing. While attempting to pass over the crossing, between 8 and 9 o'clock at night, the vehicle in which deceased was riding was struck by a fast passenger train of defendant, running at a high rate of speed, and all three of the occupants killed. The horse also was killed and the buggy demolished. The declaration consisted of three original and three additional counts. Only the latter are abstracted. The first additional count charges defendant with negligently failing to ring a bell or sound a whistle while approaching the crossing as required by law. The second additional count charges that defendant had on its engine a defective headlight which was so dim as not to give warning to travelers on the highway of the approach of the train and with running the train thus improperly equipped at a high rate of speed. The third additional count charges generally that defendant negligently and improperly managed and drove its engine and train over the crossing and in consequence thereof and while deceased was in the exercise of due care and caution for his safety, struck and killed him. That plaintiff's evidence tended to support one or more of these counts cannot be denied, but having reached the conclusion that this judgment must be reversed on account of the court's rulings in giving instructions we will not discuss the evidence further than to say, that especially as to the count charging the defendant with failure to ring a bell or sound a whistle while approach-

ing the crossing as required by the statute, the evidence was very conflicting. It was therefore necessary that the jury should be properly instructed.

The court gave six instructions for plaintiff and thirty-one for defendant. There was no instruction given for either party telling the jury that the statute required defendant to cause a bell to be rung or whistle sounded at the distance of at least eighty rods from the place where the railroad crosses any public highway and to keep the same ringing or whistling until such highway is reached. An instruction asked by plaintiff stating that the statutes of Illinois required this was refused by the court. Defendant's third instruction told the jury that it was incumbent upon plaintiff to prove by a preponderance of the evidence "that the bell was not rung for eighty rods before reaching the crossing, or that the whistle was not blown for that distance; and it is not for the defendant to prove that the bell was rung or that the whistle was blown for that distance before reaching the crossing." Defendant's tenth instruction was as follows:

"The court instructs the jury that the Illinois statute did not require this engine whistle to be blown and its bell to be rung while said engine was approaching and passing over the highway crossing in question, but it only required that one of these warning signals be given. Before he can recover upon that charge the plaintiff is required to establish, by the preponderance or greater weight of all the evidence, that neither one of these warning signals were given as required by said statute.

"Even if the jury should find from the evidence that said engine whistle was not blown, but should find from the evidence that said bell was rung as required by statute, then the defendant cannot recover on that charge of negligence.

"Or if the jury should find from the evidence that the engine bell was not rung, but should find from the evidence that its whistle was sounded, as required by statute, then in that case the plaintiff cannot recover upon such charge of negligence, and the jury should so find."

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In view of the fact that there was no instruction in the series telling the jury what the statute required with reference to giving signals for highway crossings, we think these instructions were erroneous. The jury would very likely understand from the third instruction that if the defendant's servants rang the bell or sounded the whistle eighty rods from the crossing there could be no liability under the count in the declaration predicated on the failure of defendant to give the statutory signals. The requirement of the statute is not that the bell shall be rung or whistle sounded "for eighty rods before reaching the crossing," but that such signal shall be given "at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway and shall be kept ringing or whistling until such highway is reached." Defendant's tenth instruction told the jury that the statute did not require both the bell to be rung and the whistle sounded while the engine was approaching and passing over the crossing, but that in order to entitle plaintiff to recover under the first additional count it was incumbent upon him to prove "that neither one of the warning signals were given as required by said statute." The jury would be as likely to understand that the statutory duty of defendant was stated in the third instruction as in any other instruction given. It is true the law was correctly given the jury on the subject of crossing signals in plaintiff's first instruction, but the jury was not told in that instruction that defendant's duty as therein defined was enjoined by statute. The jury had no means of knowing whether plaintiff's first instruction or defendant's third instruction stated the statutory duty of defendant with reference to giving signals for crossings.

Defendant's thirteenth instruction among other things, told the jury that before plaintiff could recover he must prove by a preponderance of the evidence "that the deceased himself was exercising reasonable or ordinary care and caution upon his part to discover the approaching train and to avoid danger from it." As we have before stated there was evidence tending to show that the highway upon which deceased

was traveling was unfamiliar to him. Every one is bound to know that a railroad crossing is a place of danger and where one knows of the existence of such crossing and approaches it with the intention of passing over it, he is bound to exercise due care and caution for his own safety, but just what constitutes such care and caution is a question of fact, and differs with the varying circumstances of the particular case. We do not think it can be said as a matter of law that one traveling over an unfamiliar highway is bound to keep a lookout for approaching trains on tracks that cross the highway but of which the traveler is in ignorance. Such traveler is required to exercise ordinary care for his safety, but it was as improper to tell the jury in this case that deceased was required to use care and caution to discover the approaching train as it would have been, had he been familiar with the crossing and its location to have told them as a matter of law that it was his duty to look and listen. It was the duty of deceased under all the circumstances to exercise ordinary care for his safety but the jury should have been left to determine whether he did exercise such care or not from the facts and circumstances proven on the trial. *C. & A. R. R. Co. v. Pearson*, 184 Ill., 386; *Chicago Terminal T. R. Co. v. Schmelling*, 197 Ill., 619; *C. M. & St. P. Ry. Co. v. Wilson*, 133 Ill., 55; *Partlow v. I. C. R. R. Co.*, 150 Ill., 321. Some other instructions of defendant appear to ignore the evidence tending to show deceased was not familiar with the crossing, and apparently assume that he knew its location and that he was approaching it for the purpose of passing over it. In this respect they were not applicable to the evidence. *Mayer v. Springer*, 192 Ill., 270.

Eleven of defendant's instructions contained repetitions of the doctrine that to entitle plaintiff to recover, the evidence must show that deceased was in the exercise of due care for his safety, that his death was caused by the negligence of defendant and that his own negligence did not cause or contribute to it. We are of opinion the frequent repetition of the same principle coming from a learned and able judge whose fairness cannot be questioned, tended to create

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the impression that the court thought this element of the case should be particularly emphasized and was calculated to have an undue influence on the minds of the jury. While repetitions are not always avoidable and are not necessarily erroneous, when they are so frequent upon a vital point, as is the case in this record, we think the effect could not be otherwise than harmful.

For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**Chicago, Rock Island & Pacific Railway Company v.
John W. Steckman.**

Gen. No. 4,607.

1. **VERDICT**—*when not set aside after three juries have passed on case.* A verdict will not be set aside as against the preponderance of the evidence unless it is most clearly and manifestly so where three juries have passed upon the case and each has found the same way.

2. **CAUSE OF ACTION**—*effect of failure to notify defendant before suit.* A cause of action is not affected by the failure of the plaintiff to notify the defendant of its existence prior to the institution of suit.

3. **ORDINANCE**—*against permitting steam to escape, construed.* An ordinance which forbids the allowing of steam to escape "when the engine is in immediate proximity of any street or railroad crossing," does not mean simply that steam shall not be allowed to escape in immediate proximity to where a street and a railroad cross each other.

4. **ORDINANCE**—*when not unreasonable.* An ordinance which forbids the allowing of steam to escape when the engine is in immediate proximity to any street or railroad crossing is not unreasonable, and is valid.

5. **DAMAGES**—*what evidence incompetent upon, in action for personal injuries.* A plaintiff in an action on the case for personal injuries should not be permitted to testify as to the number of his children but the action of the court in permitting such testimony held, in this case, not ground for reversal.

6. **ERRORS**—*what cannot be alleged upon second appeal.* Al-

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leged errors which existed upon a first appeal cannot be urged upon a second appeal of the same cause where upon such first appeal such errors were not urged.

Action on the case for personal injuries. Appeal from the Circuit Court of Rock Island County; the Hon. WILLIAM H. GEST, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

JACKSON, HURST & STAFFORD, for appellant.

J. T. and S. R. KENWORTHY, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

Appellee sued appellant in the Circuit Court of Rock Island county to recover damages for an injury sustained by him, as he alleges, resulting from the negligence of the servants of the railroad company. The case has been tried in the Circuit Court three times. The first trial resulted in a verdict for plaintiff which was set aside on the defendant's motion. On the second trial plaintiff recovered a verdict for \$5000 upon which the court rendered judgment. Upon appeal to this court that judgment was reversed and the cause remanded. C., R. I. & P. Ry. Co. v. Steckman, 95 Ill. App., 4. A statement of the case, the location and physical conditions surrounding the place of the injury, in most respects substantially like that shown by this record, will be found in our former opinion and need not here be repeated.

The declaration charged that the whistle on defendant's engine was unnecessarily sounded in a reckless, negligent, loud and unusual manner in violation of an ordinance of the city, which forbade locomotive whistles from being sounded within the city, "except necessary brake signals, and such as may be necessary to prevent injury to persons or property." It also charged that the cylinder cocks were negligently and recklessly caused to be opened and steam allowed to escape therefrom with a hissing sound in violation of an ordinance which forbade cylinder cocks from being opened to allow steam "to escape therefrom at any time while running upon or along any railroad track laid in any streets

of said city, or when the engine is in immediate proximity to any street or railroad crossing in said city. Provided, however, that when such engine shall be standing at such point in said city and for three revolutions of the driving wheel after being put in motion, the said cocks may be opened for the purpose of allowing condensed steam, to escape." Some of the counts charge that the whistle was wantonly and maliciously sounded and that the cylinder cocks were wantonly and maliciously opened to allow steam to escape. The declaration alleges that the noises of the whistle and escaping steam frightened appellee's horses causing them to run away and thereby throw him from his wagon and injure him.

It is first contended by appellant that the evidence shows appellee's injury resulted from his failure to exercise due care for his own safety. It is argued that his position on the wagon and attempting to drive his team while in that position, parallel to a railroad track, over which he knew trains were almost constantly passing, was such negligence as to preclude a recovery. It is true we expressed some dissatisfaction with the evidence on this branch of the case when the cause was before us at a former term, but we did not hold there was not sufficient evidence on this subject to warrant its submission to the jury as a question of fact. Appellee was driving along a public street where he had a right to travel. True he was sitting on a box as high as the top of his wagon box, with his feet and legs hanging down in front of the front end of his wagon and was driving on the side of the street next to the railroad tracks. Doubtless the wagon might have been so loaded as to have given him room to sit in the wagon box, but we think it cannot be said as a matter of law under the evidence, that his conduct in riding as he did was negligence. Nor can it be said as a matter of law that his position on the wagon, combined with the fact that he was driving on the side of the street next to the railroad tracks was negligence. He was driving on the proper side of the street for persons traveling in the direction he was going, and while the highest degree of care might have re-

quired him to occupy a different position on his wagon, or to have driven on the opposite side of the street, or to have gotten off the wagon on the ground when the train was approaching, appellee was only required to exercise ordinary care under the circumstances. The trial court properly submitted to the jury to determine whether appellee was in the exercise of due care, and even if it be thought the evidence upon this question is close, yet after three juries have found in his favor, we do not think we would be justified in disturbing that finding. Appellant contends the evidence does not show that the whistle was negligently, wantonly and maliciously sounded as charged in the declaration. Appellee testified his team went along quietly until the train was just opposite him when steam escaped from the cylinder cocks with a loud hissing noise and the vapor came out to his horses. This he says frightened them and caused them to start and throw him to the ground. He alighted astride one of the tugs and says he was about to get his horses under control when the whistle was sounded so frightening them that he lost control of them and was thereby injured. He does not claim to know how many blasts of the whistle were given. Andrew Greaser, on behalf of appellee, testified he was on the street near where the accident occurred and that his attention was attracted by the whistling of the locomotive and the opening of the cylinder cocks. He had previously worked for appellant a number of years, five years of the time as switchman and brakeman. He says when he heard the whistle and saw that the cylinder cocks were open, the engine was just opposite appellee's team. The team shied toward the south and jumped and appellee fell off behind the horses, after which the team ran off. He says it was unusual for engines to whistle at that place, that two long and two short blasts were given, which is known among railroad men as a crossing signal. There was no crossing near the place where the whistle was sounded. Something over 600 feet from that place the street on which appellee was traveling crossed under a viaduct to the north side of the railroad tracks. Greaser testifies except for a small shanty that obstructed

twenty-five or thirty feet of his view, he could see the railroad track ahead of the engine for a considerable distance and that he looked to see if anything was on the track and saw nothing. It is claimed the evidence shows that the team was in the habit of running away and that it took fright at the approach of the train and not at the escaping steam or sounding of the whistle. While there was some conflict in the testimony as to the character of the team for gentleness, it cannot be denied that there was a considerable amount of evidence that the team had been accustomed to working around railroad tracks and was not afraid of trains. The weight of the evidence shows that at the time of the injury the team did not take fright until the noises were made by the steam and whistle just opposite the team. Appellee's evidence makes a *prima facie* case that the sounding of the whistle was not a brake signal and was not necessary to prevent injury to persons or property and therefore sustains the charge in the declaration that it was unnecessarily and negligently sounded. The proof also sustains the charge that the cylinder cocks were opened and steam allowed to escape in violation of the ordinance.

It appears appellant was not notified of the accident until the bringing of this suit, which was seven months after the injury and its servants in charge of the engine and train were unable to recall the circumstances of the whistling or escaping of steam. While this is unfortunate, it does not change the rule of law that where a plaintiff has made a *prima facie* case entitling him to a recovery, that to avoid the recovery the defendant must overcome plaintiff's case. There being according to the evidence no apparent necessity for sounding the whistle or letting steam escape, the charge of negligence in these respects is sustained by the proof. It has been often held that a recovery may be had for an injury sustained as the result of the negligent or reckless blowing of the whistle or letting off steam from a locomotive by servants in charge of it. C., B. & Q. R. R. Co. v. Yorty, 158 Ill., 321. Our Supreme Court held in U. S. Brew. Co. v. Stoltenberg, 211 Ill., 531, that the violation of a valid

ordinance adopted for the public safety constitutes a *prima facie* case of negligence, if the violation caused the injury complained of.

On the last trial of this case appellee offered and the court admitted in evidence the ordinance we have above referred to and quoted in part, relating to the opening of cylinder cocks to allow steam to escape from a locomotive. Appellant makes a technical argument in an effort to show that the clause in said ordinance forbidding the allowing of steam to escape "when the engine is in immediate proximity to any street or railroad crossing in said city," means that steam shall not be allowed to escape in immediate proximity to where a street and the railroad cross each other and has no application to any other place. Its position is that no matter how near the railroad track runs to a street, provided it does not cross it, the ordinance would not be violated by opening the cylinder cocks and allowing the steam to escape. We do not think this position tenable, either from the language used in the ordinance or the evident object and purpose sought to be accomplished by its passage. We must assume that the ordinance was adopted for the protection and safety of persons traveling the streets, and escaping steam would be as likely to frighten teams on a street running parallel with and in close proximity to a railroad track, as it would teams on streets crossing the railroad track at right angles. It is also insisted by appellant that this ordinance is void for unreasonableness, and before the ordinance was admitted in evidence appellant introduced before the court the testimony of two engineers to show the circumstances under which the cylinder cocks were required to be opened for the escape of steam, and the necessity for allowing such escape. We think the reasonableness of this ordinance is settled by the Supreme Court in *P., C., C. & St. L. Ry. Co. v. Robson*, 204 Ill., 254, where an ordinance substantially like the one here involved was sustained.

Some objections are made to the rulings of the court in the admission and rejection of testimony. We have examined the questions raised by these assignments of errors

and are of opinion there is nothing in them that would justify us in reversing this judgment for anything that occurred in that respect. Appellee was permitted to answer over appellant's objection to the question of how much of a family he had, that he had nine children. We do not think this was material and the court should have sustained the objection, but it does not appear to us to have affected the result of the trial or to have prejudiced appellant and would therefore not justify a reversal.

It is also urged that the damages are excessive. The proof shows appellee was not under the care of a physician very long, although it clearly establishes that he was seriously and painfully injured. The testimony further shows that he left the hospital a few days after he was injured and has had very little medical care or attention since. Also that he has performed a good deal of labor of various kinds. The proof further tends to show that the injury to one of his legs is permanent and while he was engaged a good deal of the time in the performance of manual labor in different occupations, his injuries have affected him to such an extent as to interfere in some manner with his capacity for such labor and not only reduce his capacity for work, but to cause him more or less difficulty in performing his daily occupation. There was a large amount of evidence introduced upon the question of his physical condition since the injury, which was not altogether harmonious, but upon a careful consideration of it, we are unable to say that the damages recovered are excessive. In our former opinion we held they were, but the amount then was \$2,000 larger than it is now and there is proof tending to show that the time that has elapsed since the former trial has not shown appellee's condition to have improved.

The court gave three instructions on motion of appellee and it is urged two of them are erroneous and that they should not have been given. We find no serious objection to them. The principal complaint is as to the first instruction and what we have already said renders unnecessary a further discussion of it. Moreover by leave of this court appellee has filed in this case the abstract and brief of ap-

pellant in the former appeal. From these it appears that this same instruction was given and was in the record when the case was in this court by appeal of the same party at a former term and no such objection as is now made, was made to it then. Under these circumstances we are of opinion appellant cannot now be heard to question the correctness of the instruction. Our understanding of the law is that where an error exists in a record before an appellate tribunal and such error is not complained of or urged as a ground for reversal and the case is reversed for other reasons and remanded and comes back again on another appeal by the same party, such party cannot then avail himself of errors committed on the last trial which existed in the former record, but were not complained of. *Dilworth v. Curts*, 139 Ill., 508; *Manf. Co. v. Iron Fence Co.*, 119 Ill., 30. Complaint is also made of the refusal of certain instructions offered by appellant and refused by the court. What we have already said, we think, renders unnecessary any discussion of the rulings of the court in refusing the instructions complained of. We see no error in the court's rulings in that regard. We believe the jury was fully and fairly instructed for appellant. Believing there is no reversible error in the record the judgment is affirmed.

Affirmed.

**Chicago, Milwaukee & St. Paul Railway Company et al.
v. Kellie B. Carpenter.**

Gen. No. 4581.

1. RAILROAD COMPANY—*when liable to landowner for damage resulting from construction of road.* It is the duty of a railroad company in constructing its road across watercourses so to construct it as not to impair their usefulness in carrying off water flowing through them, and although it may be constructed according to approved principles of engineering, yet if injury necessarily results to adjoining landowners, the company will be liable.

Action of trespass for injury to real property. Appeal from the Circuit Court of Carroll County; the Hon. OSCAR E. HEARD, Judge,

presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

GEORGE L. HOFFMAN, for appellants.

RALPH E. EATON and C. W. MIDDLEKAUFF, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

The Ashdale and Thompson Railroad which appears to have been built for operation by the C., M. & St. P. Ry. Co. at the place involved in this controversy, runs in a northerly and southerly direction, parallel with, and about 50 rods west of the west line of a farm of 45½ acres owned by appellee. Just next appellee's west line is a public highway running north and south, parallel with the line of appellee's farm. Between the highway and the railroad the land is owned by Mr. Melendy. Appellee's farm is rather low, flat land, except there is a knoll or elevation in the southwest part of it, upon which the residence and other farm buildings stand. Sand Creek rises about two miles east of appellee's farm and flows northwesterly across his land and empties into Johnson Creek west of the railroad and drains about seven hundred acres. At its source where the water comes down from the higher land, there are deep gulches or ditches cut in the sand of which the hills are composed, the largest one of these gulches being 100 feet wide at the top and 45 feet deep. The channel proper of the creek grew shallower toward the east. It runs through a basin or valley lower than the surface of the land on either side of it, varying in width from about 150 feet at the east line of appellee's land, to 266 feet wide at the railroad bridge. Between these points the width is not uniform but is irregular, in some places being 500 feet wide. During the years of 1902 and 1903 the Ashdale and Thompson Railroad was built. In building the railroad across Sand Creek, a bridge was constructed across the channel leaving an opening 41 feet wide at the bottom and 58 feet at the top underneath the stringers. From the bottom of the stringers to the surface below was about six feet. From either end of this bridge extending

across the basin of the creek, solid embankments, upon which the track was laid, were built about 8 feet high. In August, 1904, heavy rains in that vicinity caused large quantities of water carrying great quantities of sand to come down through Sand Creek and its basin and overflow portions of appellee's lands and deposit thereon sand to a considerable depth. Again in September following, after another heavy rain the water overflowed his land and again deposited thereon great quantities of sand. The proof shows there were 17 or 18 acres of appellee's farm thus covered with sand to an average depth of about two feet. This suit was brought to recover damages from appellants, the declaration charging them with obstructing the flow of the water by building embankments across portions of the valley or basin of Sand Creek and not leaving a sufficient passageway to carry the water off as it naturally flowed there, thereby causing it to spread over appellee's land and deposit sand thereon.

Appellant's brief and argument is devoted mainly to two propositions: first, that their embankment and structure did not obstruct the flow of the water and therefore did not cause or contribute to appellee's injury; and second, that the rains that caused the damage were very heavy and unusual and the flow and deposit of sand extraordinary and unprecedented. It cannot be denied that appellee's evidence abundantly showed that prior to the building of the railroad, although after every heavy rain Sand Creek carried large quantities of water heavily charged with sand through his land to Johnson Creek, no sand to any appreciable extent was deposited by it, and none on the surface of his land. The fall of Sand Creek from the east line of appellee's farm to the railroad, a distance of about 127 rods, is, according to appellant's statement of the evidence, about 17 feet. In times of heavy rains the water would overflow the banks of the Creek and fill the basin or valley on either side to the higher land, but with such a fall it is apparent the flow was very rapid and this is supported by the testimony of the witnesses who were familiar with the stream. Appellee's evidence also abundantly tended to show that after the rail-

road was built sand began to deposit against the embankment and with succeeding freshets to extend further east toward appellee's premises, and in a large measure filled up the channel of the creek near the railroad bridge before the rains of August and September, 1904.

Upon this question there was a conflict in the evidence but the jury was warranted in finding the weight of it to be with appellee. The water from the freshet of August, 1904, flowed down against the railroad embankment depositing large quantities of sand in the channel of the creek and the valley on each side and then spread over appellee's land. A short distance northeast of his house a ravine called Spring Branch emptied into Sand Creek and from about the junction of these two streams the water left the Sand Creek Valley and flowed south and then west on the south side of appellee's house to the railroad. In doing this it passed through his barn and other out buildings depositing large quantities of sand on the surface of all the land it flowed over. According to the testimony this had never occurred before the railroad was built. The testimony of witnesses who saw the water come down against the railroad embankment is that when it did so, a kind of billow rolled back east and then left the basin east of appellee's residence, overspread his land, and ran south and west toward the railroad. The water from the storm of September overflowed the same land and ran off in the same direction.

There was a bridge across the channel of Sand Creek in the public highway running north and south along the west side of appellee's land. This bridge was something like two and a half feet lower than the top of the rail at the railroad bridge. The August freshet deposited sand under this bridge so as practically to fill the channel up to the stringers. After the August flood the highway bridge was raised about two feet, but the September flood again filled the space underneath it with sand. These floods filled the opening underneath the railroad bridge with sand to within about two and one half feet of the stringers and it is argued from these circumstances that it is impossible the obstruction was caused

by the railroad embankment, but must have resulted from the highway bridge if the overflow and damage were caused by an obstruction. The evidence shows that the highway bridge was 38 feet long and spanned the channel of the creek at a place where it ran next to the south side of the basin and was reached by a short approach from the north. The flow of water from the approach to the north side of basin was unobstructed. The evidence also is that prior to the building of the railroad there was no deposit of sand or filling up of the channel at this bridge. That the railroad embankment did obstruct to some extent the flow of water we think is clear. Prior to the building of the railroad, when the water overflowed the banks of the creek as the proofs show it did at every heavy rain, it had a basin 266 feet wide at the place of the location of the railroad to flow through. This was reduced by the railroad embankment to an opening 41 feet wide at the bottom, and 58 feet at the top. When this rapidly flowing body of water, the entire width of the basin, came down and struck the embankment, all the water on each side of the bridge must necessarily be to some extent retarded until it could flow to and pass through under the bridge. Appellants also constructed ditches north and south from the bridge on the east side of the railroad to bring water from these directions to pass under the bridge, and we think it not an unwarranted conclusion from all the evidence that the railroad embankment obstructed the flow of the water and caused the deposit of sand complained of.

The weight of the proof is that the rains that caused the floods were not unusually heavy nor greater in quantity than had fallen on former occasions. Nor do we think the fact that sand was deposited east, entirely across appellee's farm, and in large quantities west of the railroad bridge, is conclusive that the amount brought down by the waters on the occasions of these two floods was extraordinary and unprecedented. The evidence shows the water was always heavily charged with sand in time of floods, and it is not unreasonable to conclude that prior to the building of the

railroad its rapid current and unobstructed flow enabled it to carry the sand off. We are of the opinion also the deposit of sand west of the railroad in the manner shown by the evidence is not unreasonably attributable to the slackening of the current by the obstruction.

A number of civil engineers testified on behalf of appellants that according to the principles and formulas of good engineering in such cases, the opening under the bridge had twice the capacity required to carry all the water discharged through it from Sand Creek, but this could not control against the testimony of witnesses who testified to their personal knowledge and observation of the fact that it was not sufficient. At least the correctness of the theories of appellants' witnesses and the matters testified to as facts by appellee's, was a proper matter to be determined by the jury and its finding being against appellants upon this proposition, we would not be warranted in disturbing it. Especially is this true in view of the fact that by agreement of the parties the jury in charge of an officer of the court went upon and viewed the premises, and at appellants' request was instructed that such view was a part of the evidence in the case. It is the duty of a railroad company in constructing its road across watercourses so to construct it as not to impair their usefulness in carrying off water flowing through them, and although it may be constructed according to approved principles of engineering, yet if injury necessarily results to adjoining landowners, the company will be liable. *C. & M. Ry. Co. v. Thillman*, 143 Ill., 127; *T., W. & W. Ry. Co. v. Morrison*, 71 Ill., 616; *C., R. I. & P. R. R. Co. v. Moffit*, 75 Ill., 524; *O. & M. Ry. Co. v. Wachter*, 123 Ill., 440.

We have examined the complaint made as to certain questions asked on behalf of appellee and allowed by the court to be answered concerning the damage to appellee's land. It is conceded by appellants that the measure of damages, if any could be recovered, was the difference between the value of the land before the railroad was constructed and its value after the construction of the rail-

road. This was the rule adopted by the court and there was nothing in the questions complained of that could possibly have led the jury to misunderstand the rule, or think they would be authorized to award appellee any damages other than such as was caused by the obstructions complained of. Moreover, it is not claimed the damages are excessive according to the proper rule for assessing them, if appellee was entitled to recover.

Some objection is made to the ruling of the court in giving instructions on behalf of appellee. The most serious complaint under this assignment is that certain of appellee's instructions did not take into account one of appellants' theories of defense. We see no serious objection to the instructions complained of, but conceding that some of them did omit a theory of the defense, the court instructed the jury to consider the instructions as one connected body and series, applicable to the facts as a whole and not detached or separated, and at appellants' request covered and repeated in numerous instructions and very forcible language every conceivable defense they were entitled to have the jury instructed upon.

Believing substantial justice has been done in this case and that there are no errors in the record that would justify a reversal, the judgment is affirmed.

Affirmed.

Sarah J. Ames v. Jessie R. Thren.

Gen. No. 4,596.

1. FRAUD AND DECEIT—*what essential to maintenance of action for.* In order to sustain an action for fraud and deceit, it must be shown that the representations made were false and were known to be false by the party making them or that they were representations of facts which the party claimed to know the truth about when in fact he had no knowledge whatever upon the subject.

2. TITLE—*possession evidence of.* Possession and claim of ownership of land is *prima facie* evidence of title.

3. HUSBAND—*when competent as witness for wife.* A husband is a competent witness for his wife in an action which concerns her separate property.

AMES v. THREN.

Action for fraud and deceit. Appeal from the Circuit Court of Winnebago County; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

JAMES R. JAFFRAY and WILLIAM L. PIERCE, for appellant.

H. S. HICKS, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

On the 8th of January, 1903, appellant sold to appellee and conveyed by warranty deed of that date, for the expressed consideration of \$5,000, lot 13 in block 37, Gregory's Addition to the city of Rockford. This lot lies immediately west of lot 14, which is in the southeast corner of the block. Eighth street runs north and south along the east side of lot 14 and Sixth avenue runs east and west on the south side of both lots 13 and 14. Both lots were occupied by residence buildings. At the time of the transfer of the property to appellee there was a fence between the houses located on lots 13 and 14. This fence was about three feet east of the east wall of the building on lot 13, which was a brick building. Appellee claims appellant represented to her before she purchased the property that the fence was on the line between the two lots and she claims to have discovered after paying for and taking possession of the property, that the line was in the neighborhood of three feet west of the fence and that the eaves of the building on her lot and the window copings projected over upon the lot just east of hers, which is owned and occupied by a family by the name of Ekeberg. Appellee brought this suit, which is an action on the case for fraud and deceit to recover damages. The declaration charges that appellant knew where the correct line was between lots 13 and 14, but for the purpose of deceiving and injuring appellee, fraudulently, falsely and knowingly, represented to her that the fence on the east side of the building was on the line between lots 13 and 14, and that the building was wholly on lot 13 and

three feet west of the east boundary line of said lot, that appellee had no knowledge of the location of the line and relied upon the representations, honesty and good faith of appellant, and was therefore induced to purchase the property and pay for the same the sum of \$5,000.

The fence between the two lots was built in 1888. The Ekebergs built half of it and Mr. Roose, who then owned lot 13, built the other half. That portion built by the Ekebergs was next to Sixth avenue, which passed in front of the lot, and that built by Mr. Roose was in the rear. Years before that time there had been a fence entirely around lot 14 and Mrs. Ekeberg testifies the lot was so surrounded by a fence when she went upon it to live in 1883. It does not appear that prior to the building of the fence between lots 13 and 14 a survey was made to determine the true location of the line. Mr. Roose testified there was a cedar post on the south line of the lots the proper distance west of the fence on the east side of lot 14 to give the lot the proper width and the fence between his property and the Ekebergs was built on a line from this post. Some time in 1901 Hand, assistant city engineer of the city of Rockford, made a survey or measurement in the part of the city where the property in controversy is located, and claims to have located the line between lots 13 and 14 between two and three feet west of the fence. He drove an iron pin at the place he located as the line. That this action of the assistant engineer had been taken and that there was some discussion as to where the line was, was known to appellant before and at the time she sold the property to appellee. She had talked to some parties about it and made some inquiry as to whether there would be any trouble about it. This she did not disclose to appellee, and while she testifies she did not represent to appellee that the fence was on the line, she does not claim to have said anything to her about there being any controversy or misunderstanding as to where the line was. In this respect her conduct was not characterized by that frankness and sincerity that is to be expected of all persons acting honestly and in good faith.

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There have been three trials of this case, the first one resulting in a verdict for plaintiff which on motion of defendant was set aside, the second one resulting in a verdict for defendant, which on motion of plaintiff was set aside, and the last one resulting in a verdict and judgment for plaintiff below, appellee here, for \$950 from which this appeal is prosecuted. Appellant at the time she sold the property to appellee was, and during all the time she owned it, had been in possession of all the land west of the fence which separated her premises from the Ekeberg's, and so had her predecessors in title since the fence was built. Upon making the purchase appellee went into possession and has been in possession of the premises to the same extent up to the time of the last trial of this cause. There has been no physical interference with her possession nor any proceeding instituted to dispossess her of any part of the premises on the west side of the fence and it cannot be known from this record whether there ever will be. Under such circumstances we are of opinion that to justify a recovery the evidence as to the correctness of the location of the line by Hand should be clearer than we find it to be from the testimony in this record. Gregory's addition is in the northeast corner of section 26, and lies on the west side of the section line. There appears to be an addition to the city lying just east, called Porter's addition. The plat introduced in evidence of Gregory's addition does not appear to have been drawn to any scale and cannot therefore be relied upon in determining distances such as widths of streets, lots, etc. Hand, the assistant city engineer, is the only witness who testified to the location of the line being where he placed the iron pin west of the fence and his testimony is based upon a survey that we do not think would justify us in sustaining this verdict and judgment. He does not claim to have started in making the survey from any government or other known and established monument. He assumed that the section line running south from the northeast corner of section 26 was in the middle of Ninth street, and that Ninth street was 100 links wide. But this is not

shown by the plat. It may be if this assumption is correct that the line is located where Hand claims it is, and it may be also that his assumption with reference to the location of the section line and the width of Ninth street is correct, but surveys which determine the rights of parties to property should be based on something more certain than assumptions. Hand also found an iron pin or pins some distance from the lot in controversy and assumed they were correctly placed to locate boundaries and from which surveys might be accurately made. He testifies he knows some of these monuments have been replaced and have been recognized by county surveyors, but he also says he has no means of knowing whether an iron stake or pin he located was in the same place that the original was. He testifies also that an iron stake at the southeast corner of block 37 was placed there at the instance of the city engineer, but that there is no record of it and whether it was done after a survey was made and in accordance with a line run from established monuments does not appear. The county surveyor of Winnebago county testified to making a survey in which he located the line between lots 13 and 14 about sixteen inches east of the line located by Hand. In making his survey he attempted to find government monuments either at the section corner or half section corner of section 26, but says he was unable to find the monuments. It appears from the testimony that Hand was governed largely in his survey by the plat introduced in evidence, which as we have said was not drawn to a scale and does not show distances correctly between lines. Upon a similar question our Supreme Court said in *Village of Winnetka v. Prouty*, 107 Ill., 218:

“An instrument of conveyance ought, upon its face, to show at least enough to enable a competent surveyor to find with absolute certainty, that which is assumed to be conveyed. But how can a surveyor tell where the limits of streets are unless he knows their width, or has before him data from which he can ascertain it? It is not shown by anything upon or connected with this plat, that we have

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been able to discover, what is the width of any of the streets proposed to be laid out, much less whether it is intended all the streets shall be of the same width, or what width was proposed to be given to the particular street in controversy. Some general inference, it is possible, might be drawn from the width of streets in general, or from the width of other streets known and established in the village, but this is manifestly not sufficient. The width of the streets of all villages, towns or cities is not necessarily the same; nor are all of the streets in the same village, town or city necessarily of the same width."

It is also to be borne in mind that appellant was not a party to, nor so far as appears from the evidence, had she any knowledge of the survey made by Hand until after it was made. She testified she believed the fence to be on the line at the time she sold the property to appellee, and while she denies so representing it to her, she says if the question had been asked her she would have told her the fence was on the line because she believed it to be so. Her possession and claim of ownership was *prima facie* evidence of title. *Anderson v. McCormick*, 129 Ill., 308. We have held in *Smith v. Hoffman*, 122 App., 198, and *Love v. McElroy*, 118 App., 412, that in order to sustain an action for fraud and deceit it must be shown that the representations made were false and were known to be false by the party making them, or that they were representations of facts which the party claimed to know the truth about when in fact he had no knowledge whatever about the subject.

On the trial a witness testified that he had occupied lot 13 prior to its sale to appellee as the tenant of appellant and that while he so occupied it appellant and her husband came to look at the property one day, and that appellant said she wanted the fence on the west side of the lot torn down so that she could get the land on that side that belonged to her, and spoke of the pins that had been set by Hand. Appellant denied this conversation and offered her husband as a witness to testify as to what was said between

her and the tenant at the time mentioned by him. Appellee objected to his competency on the ground that he was the husband of appellant. The objection was sustained and the witness was not allowed to testify. In this the court erred. The litigation concerned the separate property of the wife, and she would, if unmarried, have been the defendant in the case. In such cases section 5 of the chapter on Evidence and Depositions makes the husband a competent witness. See also *McNail v. Zeigler*, 68 Ill., 224; *Obermann Brewing Co. v. Ohlerking*, 33 Ill. App., 356. All we need say with reference to the instructions complained of, is that the law requires appellee to prove the line to be in a different place from that represented to her by appellant and that with knowledge of this fact appellant falsely and fraudulently and knowingly deceived her as to the location of the line, and the jury should be so instructed. For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**Chicago & Joliet Electric Railway Company v. Michael
H. Freeman, Administrator.**

Gen. No. 4,613.

1. FENDERS—*ordinance requiring, upon traction cars, sustained.* An ordinance requiring fenders upon traction cars is reasonable and valid but a provision therein with respect to the position and height of such fenders, if impracticable, is void.

2. ORDINANCE—*invalid provision of, does not void.* An ordinance may be sustained in part and held invalid in part.

3. CONTRIBUTORY NEGLIGENCE—*minor cannot be guilty of.* A child of between the age of five and six years cannot be guilty of contributory negligence.

4. SUPREME COURT—*decisions of, binding upon Appellate Court.* The decisions of the Supreme Court of this State are conclusively binding upon the several Appellate Courts thereof.

5. NEGLIGENCE—*when violation of ordinance prima facie evidence*

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of. A violation of an ordinance adopted for the safety of the public is *prima facie* evidence of negligence.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

E. MEERS, for appellant; E. C. HALL, of counsel.

BARR, BARR & BARR, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

At about 7 o'clock in the evening of the 7th day of May, 1903, Anna Freeman, a child not yet six years of age, was run over and killed on South Chicago street, in the city of Joliet, by one of appellant's cars operated by electric power, while in charge of its servants. This suit was brought by the administrator of the deceased to recover damages on the ground that the death was caused by the negligence of appellant's servants. Appellee recovered a verdict and judgment for \$1,800 from which this appeal is prosecuted. The first count of the declaration charges defendant generally with negligence in driving and managing its car and by reason thereof causing the death of plaintiff's intestate. The second charges that defendant was required by the ordinances of the city of Joliet to provide its cars with fenders and after setting out the ordinance, alleges that the car which caused the injury was not equipped with any fender whatever. It was contended on the trial and is urged here by appellant that the ordinance relating to fenders is entirely void as being impracticable and unreasonable. The ordinance is as follows:

"There shall be placed and maintained on every car used on every street railroad, a fender, which shall be placed not more than two inches from the ground or surface of the street, and shall entirely surround the running gear of the car; such fenders shall be pointed at each end of the car; shall extend as far out as the end of the platform, and shall be so constructed and placed as to afford the best possible

protection to persons with whom such cars might come in contact."

After hearing the evidence offered by appellant to show the unreasonableness of the ordinance, the trial court held that the ordinance was valid except as to the provision requiring fenders to be placed not more than two inches from the ground or surface of the street. That provision the court held unreasonable but otherwise sustained the ordinance and allowed it to be read to the jury. We are of opinion the ruling of the court upon this subject was correct and that while the provision with reference to the height of the fender above the surface is void as being impracticable and unreasonable, yet the other parts of the ordinance requiring appellant to provide its cars with fenders is not void and it was the duty of appellant under said ordinance to provide its cars with fenders, so placed as to provide all reasonable protection to persons traveling on the streets, and at the same time not materially interfere with the practical operation of cars. The object of the ordinance was to require fenders to be used for the protection of the public and if the provision relating to the height the fenders were to be placed above the surface was unreasonable in that it could not be carried out without materially interfering with the operation of cars, still it was practicable for appellant to equip its cars with fenders practicable for use by it, and at the same time provide a measure of protection to the public; and we are of opinion that notwithstanding the provision with reference to the height of the fenders may be considered unreasonable, it does not invalidate the whole ordinance, and that under said ordinance it was the duty of appellant to place fenders on its cars. That an ordinance may be void in part and valid in part is sustained by *City of Quincy v. Bull*, 106 Ill., 337; *Harbaugh v. City of Monmouth*, 74 Ill., 367; *Kettering v. City of Jacksonville*, 50 Ill., 39; *Imes v. C., B. & Q. R. R. Co.*, 105 Ill. App., 37, and *Brooklyn v. Nassau Electric Ry. Co.*, 56 N. Y. Supp., 605. This latter case we think is very much in

point. An ordinance of the city of Brooklyn required the city railway companies within sixty days after its approval to equip every car with a fender attached to the front platform; "not more than three inches from the tracks and to be made and modelled in such manner that it will be impossible for any person or persons to pass under the fenders or the platform of said car or cars, and come in contact with the wheels of said car." The ordinance provided a penalty of \$25 for the wilful or negligent failure to comply with it. Suit was brought to recover the penalty and it was held that the portion of the ordinance requiring fenders to be not more than three inches from the tracks was unreasonable and void, but that the other portions of the ordinance were valid. While the declaration here sets out the ordinance and charges its violation by appellant, the *gravamen* of the charge is not that it failed to place fenders on its cars not more than two inches above the surface, but that it failed and refused to place any fenders whatever on the car that caused the injury.

A good portion of appellant's brief and argument is devoted to the rule announced in the first instruction given for appellee. That instruction told the jury that if they believed from the evidence Anna Freeman was at the time of the accident a child between five and six years of age, she could not be guilty of or charged with negligence. It is admitted this instruction states the law as announced in *Chicago City Railroad Co. v. Tuohy*, 196 Ill., 410, and *I. C. R. R. Co. v. Jernigan*, 198 Ill., 297, but it is argued that this rule is of ancient origin and ought not be adhered to in this age of development and enlightenment. We understand the law of the cases referred to, to be binding upon us and that we have no power to change or alter the law as therein stated, nor have we the inclination to do so if we had the power. We find no error in any of the rulings of the court relating to the giving or refusing of instructions. While contributory negligence is not imputable to a child under seven years of age, still to charge a party with liability for causing the death or injury of such a child, it

must be proven that the party causing the injury was guilty of negligence. It is earnestly contended here that the motorneer in charge of appellant's car was not guilty of negligence as shown by the testimony. In the first place we hold appellant was required by the ordinance referred to, to equip its cars with fenders. The proof shows the car which caused the death of plaintiff's intestate had no fenders. The violation of an ordinance adopted for the safety of the public is *prima facie* evidence of negligence. U. S. Brewing Co. v. Stoltenberg, 211 Ill., 531. Appellee's proof tends to show that the car at the time it struck the child was running at the rate of from twelve to fifteen miles per hour and that the gong was not being sounded. One witness thinks the speed was about twenty miles per hour. The proof also shows this was a much frequented street for pedestrians and children, and that a number of them were in the street at the time of the accident. It was an asphalt paved street and doubtless furnished an attractive place for children. Appellee's proof also shows that from the place where the child was struck by the car to the place where it stopped and where the child was taken from under the car was at least 125 feet. One of the appellee's witnesses testified he was on the street and saw the accident, but did not know at the time the child was struck what it was, that it looked like a piece of brown paper whirled from the street by the running car; that he went to the car immediately upon its stopping and heard the motorneer say he did not know what he had run over, whether a cat or a dog. Appellant's proof tended to show that the speed of the car was from eight to ten miles an hour and that the gong was sounding. One of the witnesses testified his attention was first attracted to the car by the loud and swift ringing of the gong. The motorneer testified he was running between eight and nine miles per hour, that before he reached the place where his car struck deceased, he slowed down on account of a boy being near the track and then fed up his car to five points power. He says he saw children playing about Third avenue, which is just

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south of the place where he struck deceased, and shut off the power and left the car coast. That the little girl came out in front of the car, that when he saw the danger, she was about twelve feet from him and that he immediately applied the brake and reversed the power. It will thus be seen that the evidence was conflicting, but we think it cannot be said that appellee's testimony did not tend to prove negligence on the part of the motorneer. The distance the car ran and dragged the child after striking her tends to support appellee's claim that the car was running at a considerably higher rate of speed than was claimed by the motorneer. He testified that with his power shut off and the car coasting, he could stop it within about sixty feet, that if running at the rate of fifteen miles an hour he could stop it within 125 feet. The weight of the proof shows he did not stop the car under 125 feet after striking the child. If the testimony of the witness as to the remark made by the motorneer after the car stopped is to be believed, it would tend to show that he did not see the child before striking it. True he denies making any such remark but the weight of the evidence and the credibility of the witnesses were matters for determination by the jury, and we are unable to say that they were not warranted in finding appellant guilty. The judgment therefore is affirmed.

Affirmed.

MR. JUSTICE DIBELL, having tried this case in the court below, took no part in its consideration here.

Chicago & Alton Railway Company v. U. W. Louderback, Administrator.

Gen. No. 4,620.

1. CONTRIBUTORY NEGLIGENCE—in crossing railroad track, held not to appear. Held, from the evidence in this case, that it did not appear as a matter of law that the plaintiff in attempting to cross a railroad track was guilty of contributory negligence.

2. RAILROAD CROSSING—*care required in passing over.* One attempting to cross over a railroad track is not required to exercise extraordinary care but is only required to exercise ordinary care such as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances.

3. MEASURE OF DAMAGES—*instruction as to, in action for death caused by alleged wrongful act, held not ground for reversal.* An instruction which tells the jury that if they find from the evidence that the plaintiff was entitled to recover then they should assess the damages merely at the amount of the pecuniary loss, if any, that the next of kin had or may sustain by reason of the death of the plaintiff's intestate, is not ground for reversal notwithstanding it is inartificial in failing to refer the jury to the evidence in fixing the amount of the loss to the next of kin.

4. NEGATIVE TESTIMONY—*when instruction as to, improper.* An instruction is improper which tells the jury that the testimony of witnesses that they would have heard a bell or whistle if they had been rung or sounded, and that they heard none, was entitled to less weight than the testimony of witnesses who stated that a bell was rung or whistle sounded.

5. OBLIGATION TO SUPPORT—*instruction as to, in action for death caused by wrongful act, improper.* An instruction in such an action is improper which tells the jury that when the plaintiff's intestate had attained his majority he would have owed no support to his next of kin, except in the event of their pauperism, and that the deceased was as likely to have become a pauper as his next of kin.

6. INSTRUCTION—*when presented too late.* An instruction is properly refused where it was not presented before the beginning of the closing argument, as required by rule of court.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

C. C. and L. F. STRAWN, for appellant.

GUY LOUDERBACK and A. C. NORTON, for appellee.

MR. JUSTICE FARMER delivered the opinion of the court.

Curtis Fike, a boy between sixteen and seventeen years of age, while driving over appellant's tracks where they crossed Deer street, in the village of Odell, was struck by a locomotive engine and killed. This suit was brought by

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his administrator to recover the damages to his next of kin, resulting in a verdict and judgment in favor of the plaintiff for \$3,623.50, from which this appeal is prosecuted. Deceased was engaged in hauling corn to an elevator, which was located near appellant's tracks and on the southerly side of Deer street crossing. Appellant's railroad ran through the village of Odell in a northeasterly and southwesterly direction and was crossed by Deer street at right angles. In delivering his load of corn to the elevator, deceased came from the west on Deer street and passed over the tracks of appellant. After unloading the grain he drove around to the scales, which were near the office building of the elevator company and north of and closer to Deer street than the elevator. It was but a short distance from the scales to appellant's tracks at the street crossing and it was while deceased was attempting to drive from the scales over this crossing after unloading his grain that he was struck. The principal contention of appellant is that deceased was guilty of such negligence in attempting to pass over the crossing ahead of the approaching engine that there can be no recovery. It is insisted that this negligence is so conclusively shown by the evidence that it becomes a question of law and that the court should have directed a verdict for the defendant. To support this position counsel assume that deceased saw the approaching engine and attempted to pass over the tracks ahead of it. We do not think this position is sustained by the evidence. The proof shows that there were a number of loads at the elevator ahead of deceased, and that when he reached the tracks of appellant, he stopped on the railroad for a few minutes until teams ahead of him had passed out of his way so that he could drive across and to the elevator. The proof further shows that while he was thus standing on the tracks, a train drawn by the engine in question, approached from the south, and it is argued from this that he knew there was a train approaching. The train was a freight and stopped something more than a mile south of the crossing and there is no proof that deceased saw it any closer to the crossing than when it had

stopped south of the town. Some other witnesses who testified, did see it closer, but none, as we understand this evidence, saw it nearer than a block to the Deer street crossing until it struck deceased's wagon. Some distance south of the crossing the engine was detached from the train and the great weight of the proof shows that it approached the crossing without either ringing the bell or sounding the whistle. There was a box car standing on the side track east of the track the engine was on, and on the side from which the deceased was approaching, which extended out into the street some distance. South of it were other cars, and these could not but obstruct the view of one approaching the crossing from the east, as deceased was. There is no proof that deceased saw the approaching engine until he was on the track and he then attempted to hurry over, but it was too late. It is argued that if deceased had looked or listened he could have seen or heard the approaching engine, and that failing to do so was such negligence as to preclude a recovery. Our Supreme Court held in *C. & N. W. Ry. Co. v. Dunleavy*, 129 Ill., 132, that a failure to look or listen even where it affirmatively appears that doing so would have enabled the party exposed to injury to see an approaching train and avoid it, is evidence tending to show negligence, but is not so conclusive that a charge of negligence can be predicated upon it as a matter of law. See also *T. H. & I. R. R. Co. v. Voelker*, 129 Ill., 540; *C., M. & St. P. Ry. Co. v. Wilson*, 133 Ill., 55. Undoubtedly to sustain a recovery in such a case it must appear that the injured party was in the exercise of due care and caution, and what is due care and caution must depend upon the circumstances of the particular case. The jury affirmatively answered a special interrogatory as to whether, under all the evidence and in view of deceased's knowledge of the circumstances and surroundings, he was in the exercise of the care and caution in approaching the crossing that a reasonably prudent man would have exercised under similar circumstances. The Supreme Court and this court have often held that a traveler on a public street, which is crossed

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by a railroad, has a right to rely upon the company's servants in charge of its trains giving the signals required by law when approaching the crossing. While there was some evidence of those in charge of the engine tending to show that the bell was rung, yet it is very inconclusive and unsatisfactory, and the overwhelming weight of the testimony is that none of the numerous witnesses who testified for appellee on that question heard or knew the engine was approaching the crossing, and that the bell was not rung nor the whistle sounded as required by law. Admitting that deceased knew that there was a train some where south of the crossing, he had a right to suppose that it would not approach and attempt to pass over the street without giving warning. It having failed to do so, and this coupled with the fact that the view of its approach was obstructed, we are of the opinion the court properly refused to direct a verdict and properly submitted to the jury to determine whether deceased was in the exercise of due care and caution, and whether his death resulted from the negligence of appellant as charged in the declaration. The jury having found against appellant on these propositions, we are also of opinion the court was warranted by the evidence in rendering judgment on the verdict.

Some complaint is made of the fourth, fifth and sixth instructions given on behalf of appellee. The fourth instruction told the jury that the law did not require the exercise of extraordinary care by deceased, but only required ordinary care such as a person of ordinary prudence and intelligence would usually exercise under the same or similar circumstances. We fail to see any fault in the instruction. The fifth told the jury that if they found from the evidence that plaintiff was entitled to recover then they should assess the damages merely at the amount of the pecuniary loss, if any, that the next of kin had or may sustain by reason of the death of Curtis Fike. It may be the instruction would have been in better form if it had referred the jury to the evidence in fixing the amount of the loss to the next of kin, but we think it could not be misunder-

stood by the jury, and that appellant was not prejudiced by it. Besides appellant's thirteenth given instruction upon the same subject contains the same omission. We see no fault with the sixth instruction. It is also said the court erred in refusing appellant's ninth and fourteenth instructions. The ninth told the jury that the testimony of witnesses that they would have heard a bell or whistle if one had been rung or sounded, and that they heard none, was entitled to less weight than the testimony of witnesses who testified that a bell was rung or whistle sounded. We think it was correctly refused by the court. The fourteenth told the jury that when deceased had attained his majority he would have owed no support to his next of kin, except in the event of their pauperism, and that the deceased was as likely to have become a pauper as his next of kin. We think this also was properly refused. Besides the record shows it was not presented before the beginning of the closing argument as required by a rule of court, and no reason appears, nor is any excuse offered, for failing to present the instruction in compliance with the rule. Believing there are no errors of law in this record and that the verdict and judgment were warranted and sustained by the evidence, the judgment is affirmed.

Affirmed.

Addison A. Faxon v. Mr. and Mrs. Henry Monser.

Gen. No. 4,576.

1. REPLEVIN—*when verdict in, not responsive to issue.* A verdict of not guilty is not responsive in an action of replevin, where the issue is one of ownership.

Action of replevin. Appeal from the Circuit Court of DeKalb County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

CLIFFE & CLIFFE, for appellant.

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CARNES, DUNTON & FAISSLER, for appellees.

MR. JUSTICE FARMER delivered the opinion of the court.

This is an appeal from a judgment in the Circuit Court in an action of replevin brought by appellant against appellees to recover 13 turkeys. The suit was originally brought before a justice of peace and by appeal removed to the Circuit Court. Both parties claimed to be the owner of the turkeys, each claiming to have owned them since they were hatched. Appellees claimed their turkeys strayed away and disappeared for a while and were later discovered by them in a flock of turkeys belonging to appellant, who was a neighboring farmer to appellees. They thereupon separated the turkeys they claimed from the rest of the flock and took possession of them, and appellant brought this suit to recover them back. After hearing the evidence in the Circuit Court the jury rendered the following verdict, "We, the jury, find the defendants not guilty." Appellant thereupon moved the court to set aside the verdict and grant a new trial, and among the grounds of said motion urged that the form of the verdict was improper, and that the verdict did not pass upon or settle the issues involved in the case. The court overruled the motion and rendered judgment in favor of appellees and awarded a *retorno habendo*. Later, but during the same term of court, on motion of appellees, the order for a *retorno habendo* was vacated and the judgment as finally entered is simply a judgment against appellant for the costs of the litigation.

As, in the view we take of this case, the judgment must be reversed on account of the insufficiency of the verdict, we do not deem it necessary to discuss the evidence which was conflicting, nor the other errors assigned. On the trial both parties claimed to own the turkeys and each introduced a number of witnesses whose testimony tended to support their respective claims, and the question as to who was the owner was the real contest in the case. It is not controverted that appellees took the turkeys out of a flock that belonged to appellant and detained them until this suit was brought.

The verdict in this case is responsive to the issues of *non cepit* and *non detinet*. The real issue and the one to which the evidence was directed was as to the ownership of the property, and upon this question in our opinion the jury did not pass at all so far as appears from their verdict. It is argued by appellees that as the suit was originally begun before a justice of the peace, there were no written pleadings; and that the verdict must have been intended to be responsive to all the issues in the case and should be so considered. It is not claimed, however, by appellees that the verdict authorized a judgment in their favor for a return of the property and recognizing this, on their motion, the court, after having rendered judgment awarding them a writ of *retorno habendo*, set it aside and rendered judgment only for costs in their favor. We think the issues were as well defined in this case as if there had been written pleadings. If the turkeys belonged to appellees they were not wrongfully taken nor wrongfully detained, but if they were not theirs, they were wrongfully taken and wrongfully detained, and these issues could only be determined by a determination of the ownership of the property. It is conceded by appellees that under the verdict and judgment in this case they have no right to the property and that it is lawfully retained by appellant. If the turkeys were the property of appellant, then it cannot be denied under the facts in this case, that a verdict that appellees were not guilty of wrongfully taking and detaining them is contrary to all the evidence in the case. If the verdict of the jury, instead of finding the defendants not guilty, had found the issues in their favor, then it might have been sustained upon the theory that all the issues were found for appellees, but the verdict in this case is responsive only to the issues of *non cepit* and *non detinet*, and to hold that it was a finding on the question of the ownership of the property would be to inject into it something that was never found or passed upon by the jury as shown by this record. It is true some expressions are to be found in a few cases referred to by appellees' counsel in their brief tending to support their po-

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sition, that as there were no written pleadings the verdict is sufficient to sustain a judgment for costs, but we do not think this position supported by the weight of authorities in this State. That a verdict of not guilty in a replevin suit does not determine the right of possession or ownership of property is conclusively settled by *Rohe v. Pease*, 189 Ill., 207. Counsel for appellees concede that under the verdict in this case appellant was entitled to the property and say in their brief: "It may be, on this record, inconsistent that the issue of property should be found for the plaintiff and the issues of wrongful taking and wrongful detention found for the defendant, but the plaintiff (appellant) is not injured if the evidence sustains the verdict as to those issues that were found against him, and it is familiar doctrine that an appellant cannot complain of error that did not injure him." To hold that such error is harmless would clearly be wrong. It is not disputed that on account of three trials in a justice's court and one in the Circuit Court a large amount of costs have accrued in this case and it appears to us it would be unreasonable to hold that while appellant is the owner and entitled to the possession of the property in controversy he cannot complain of a judgment against him for costs in recovering it. On the other hand if appellees were the owners of the turkeys, it would be doing violence to their rights to award them to appellant upon his paying the costs of the litigation.

It is doubtless true that the value of the property here involved is entirely disproportionate to the amount of costs accrued and that the litigation should be terminated as speedily as possible, yet this would not justify us in violating the rules of law to bring about this much desired result. The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

**John W. McDaniel v. School Directors of District No.
Sixteen, Stephenson County.**

Gen. No. 4584.

1. **FORCIBLE DETAINER**—*what school authorities may maintain.* In an action of forcible detainer the school directors are the proper plaintiffs; where, however, the title to land is involved, the school trustees are the proper plaintiffs.

2. **FORCIBLE DETAINER**—*when one without right of possession may successfully maintain.* Where one is in peaceable possession of a house he may recover possession of such house where his possession has been invaded, notwithstanding he is without any claim of right.

3. **SCHOOL DIRECTORS**—*when status as, cannot be questioned.* In an action of forcible detainer the defendant cannot question the manner and legality of the election of the school directors who are plaintiffs.

Action of forcible detainer. Appeal from the Circuit Court of Stephenson County; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

R. J. CARNAHAN, for appellant.

ECKERT & McDONALD, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The school house in Basswood District in Stephenson county had a yard about it, enclosed by a fence. The premises had been occupied for school purposes at least thirty years, and the east fence had been in one place for that length of time. On December 10, 1904, John W. McDaniel, owner of the adjoining land, entered upon the premises and moved the east fence west fifty feet to a point fifteen and one-half feet west of the east line of the school house, thereby taking into his own enclosure all the land in the school yard from the east fence to a line fifteen and one half feet west of the east line of the school house except

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that part thereof on which the school house rested. There were upon said tract an outhouse, a play ground and a pile of wood, all used in connection with the school. McDaniel moved the wood and outhouse to his own premises. At the time McDaniel took such possession there was a school in progress upon the premises, conducted by a teacher hired by the board of school directors of the district. The school directors brought forcible entry and detainer before a justice of the peace to recover possession and had judgment. McDaniel appealed to the Circuit Court, where the case was tried without a jury, with a like result. McDaniel now appeals to this court, and seeks a reversal on two grounds, viz.: (1) that the suit could not be maintained by the school directors, but should have been brought by the school trustees, and (2) that there is no sufficient proof that plaintiffs were legally elected such directors.

In *Wilson v. School Directors*, 81 Ill., 180, the directors filed a bill to compel conveyance of a school house site. It was held the suit could not be brought by the directors. In *Banks v. School Directors*, 194 Ill., 247, the directors brought suit to condemn land for a school house site. It was held the school trustees are the proper and necessary petitioners in such a case, and in whom the judgment of the court vests the title upon payment of the compensation. Section 31 of article 3 of chapter 122 of the Revised Statutes, relating to schools, provides that the trustees of schools shall have the title, care and custody of all school houses and school house sites; and that the supervision and control of such school houses and school house sites shall be vested in the board of directors of the district. It is upon this statute and upon these authorities defendant relies. Plaintiffs rely upon the same statute and upon the following authorities. In *Shoudy v. School Directors*, 32 Ill., 290, the school directors of a district brought forcible entry and detainer to recover possession of a school house, and a judgment in their favor was sustained. The question whether it should have been in the name of the school trustees was not discussed. *Alderman v. School Directors*, 91 Ill., 179,

was trespass for breaking and entering a school house, and school directors brought the suit and had judgment, and sustained it. The court said the legal title was in the trustees of schools, but that the actual possession was at the time in the school directors. The court also said: "By the statute the supervision and control of school houses is expressly vested in the directors; and they may grant the temporary use of them, when not occupied by schools, for certain specified purposes, and the teachers and pupils are under their immediate control, and it is difficult to see how they could under any circumstances successfully perform the functions required of them, without they have the right to maintain such action. How, otherwise, could they hold possession than by a school under their control and the house yet be occupied for the purposes for which it was intended." *Ruble v. School District No. 5*, 42 Ill. App., 483, was a bill by a school district and two of its directors, with whom joined a taxpayer, under which defendant, the third director, was perpetually enjoined from removing a school house from its present location. It was argued that the trustees were the proper parties to bring the suit. It was held that the act enjoined was a clear interference with the right of control given the directors, and the restraining power of the court was properly invoked by them, notwithstanding the trustees were invested with the title, care and custody, for it was the control which was involved. It was also said that as the directors have control of school houses, a right of action to prevent interference with the proper exercise of that control rests with the directors. It will be noted that by the terms of the statute the school house site is as much under the supervision and control of the directors as is the building. These cases seem to establish that wherever the suit is to obtain or assert title to a school house or school site the trustees must be plaintiffs, but where the possession and control thereof is the issue, the directors are the proper plaintiffs. Especially must that be so here, where, at the time defendant took possession, a school was in actual progress, conducted by a teacher hired by the directors. The woodyard, play

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ground and outhouse, were as essential to the conduct of the school as was the school house. The entire premises were then occupied and used by the directors for school purposes.

The proof showed that three persons named were acting as the school directors of this district and had been for several years, and that they held a meeting and authorized this suit. Section 12 of article 5 of said chapter 122 of the Revised Statutes, enacts that the poll book used at the election of school directors shall be filed by the township treasurer, "and shall be evidence of said election." No such poll book was produced at this trial, and it is argued that it was not proved that said three persons were elected directors and had lawful authority to bring this suit. The directors are a body corporate (section 2 of said article 5), and this suit is by the corporation and not by the individuals holding the office of director. *Shoudy v. School Directors, supra*. The manner and legality of their election could not be litigated by defendant in this case. *Alderman v. School Directors, supra*.

If the respective rights, powers and duties of school trustees and school directors in relation to school houses and school sites, as between themselves, were not as above stated, or if that position were in any doubt, still this board of directors was in peaceable possession of the school house and yard, conducting a school, and defendant invaded that possession without any claim of right so far as this record discloses. Under such circumstances the directors could recover their possession from the intruder in an action of forcible entry and detainer, no matter how unauthorized their own possession might be as against a party lawfully entitled thereto.

The judgment is affirmed.

Affirmed.

**Chicago & Alton Railway Company v. George T. Blake,
Administrator.**

Gen. No. 4,592.

1. CONTRIBUTORY NEGLIGENCE—*when one attempting to cross railroad tracks guilty of.* Held, from the evidence of this case, that the plaintiff's intestate, in attempting to cross railroad tracks, was, as a matter of law, guilty of contributory negligence.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of LaSalle County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1905. Reversed, with finding of facts. Opinion filed March 10, 1906.

LESTER H. STRAWN, for appellant; WINSTON, PAYNE & STRAWN, of counsel.

H. H. DICUS and REEVES & BOYS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court. Bloomington street in the city of Streator runs north and south. Kent street crosses it at right angles. One hundred and eighty-nine feet north of Kent street a single track branch of the Chicago & Alton Railway crosses Bloomington street nearly at right angles, but varying slightly to the northeast and southwest. The railway track is straight for about 1100 feet west of that crossing, and the track can be seen west from the Bloomington street crossing for 1600 or 1700 feet. About 700 feet west of Bloomington street the railway passes under a viaduct at another street. The railway comes from the west to Bloomington street on an up grade through a depression. The rise from the viaduct to Bloomington street crossing is from $7\frac{1}{2}$ to $8\frac{3}{4}$ feet; and that crossing is 4 feet and 9 inches below Kent street. South of the right of way and west of Bloomington street there are a number of sheds and outhouses, north of one of

them a barn, and on the south end of those lots, facing south on Kent street, are several houses. The ground immediately west is somewhat higher than in Bloomington street. A person going north from Kent street on Bloomington street finds that these buildings and rise in the ground and depression of the railroad track partially obstruct his view of a train approaching from the west till he comes within something like 100 feet of the track. A camera stationed on Bloomington street 100 feet south of the crossing produced a photograph showing the shirt front of a man of ordinary height standing on the track 175 feet west of the crossing. Nearer the track a view much farther west can be had by a person in the street looking that way. The top of the smoke stack of the engine hereinafter mentioned was 14 feet and the top of its cab 13 feet above the rail; and it is common knowledge that baggage and passenger cars are about the same height as the cab. A train in this depression could be seen much further west than a man, because of its greater height. George Cramey was going to his work at about 5:15 p. m. of October 2, 1901. He was riding a bicycle and going north on Bloomington street. At the Chicago & Alton crossing on that street he came into collision with the engine of a regular east-bound passenger train, which was about 5 minutes behind time, and was going about 15 miles per hour, in violation of an ordinance limiting such speed to 10 miles per hour. Cramey was thrown perhaps 30 feet; his skull was fractured and one leg broken; and he died in about three hours. His administrator brought this action against the railway company to recover damages for the benefit of his next of kin, who are Syrians of Lebanon, in Asia Minor. The declaration charged that defendant so carelessly drove and managed its engine and train, that said engine struck said bicycle; that a bell was not rung or whistle sounded as the train approached the crossing; that the train was run at a speed which violated an ordinance of the city; and that defendant had erected at said crossing a bell or gong and certain wires, so constructed that the bell would sound when an engine or car came within 1200 feet

of the crossing, and would continue to sound until the engine or car had passed over the crossing; that defendant negligently and in violation of its duty permitted said device to become out of repair, and that in consequence thereof it gave no warning of the approach of the train in question. Each count charged that by the cause in that count stated the engine struck the bicycle and caused Cramey's death. Two counts also charged that the engine struck Cramey. There was a plea of not guilty, a trial, and a verdict and a judgment for plaintiff. Defendant appeals.

The bell or gong at the crossing was not rung that day. There was very slight proof that it had been rung during the time Cramey had lived in Streator, which was more than five years. There was no proof that it had been connected with wires so as to ring when an engine was within 1200 feet or any other distance from that crossing, and no proof of any facts which made it the duty of defendant to have the gong in operation or which authorized the public to rely upon it. There is therefore no evidence which makes the failure of that gong to sound of any importance in this case.

Each count of the declaration alleged that Cramey was exercising due care. Appellant contends that the proof shows that he lost his life because of his lack of due care. We have carefully searched the evidence upon this subject, not only in the abstract but in the record also, and have reached the conclusion that the proof is overwhelming that Cramey must have known of the approach of the train long before either of them reached the crossing. Every witness on both sides (except possibly Maggie Little) who was in that neighborhood at the time of the accident knew the train was coming long before it reached that crossing. There were six witnesses who were not employes of defendant who knew the train was coming. Most of them first heard it whistle and then looked and saw it coming, but one saw it and then heard it whistle. In addition to these six witnesses, the engineer, fireman, baggageman, conductor and brakeman, each testified that a long station whistle was sounded at or just east of the Vermilion river bridge (which

is about 2500 feet west of the crossing in question), and that a crossing whistle of two long and two short blasts was sounded at or near the viaduct, and one of them testified this whistling lasted till the engine had nearly reached Bloomington street. The men who should know testified the bell was rung continuously till the train reached the crossing. Others testified that it was not rung, and others that they did not hear it or did not remember whether it rung. At least three and perhaps four efforts were made to warn and stop Cramey. The witness Dean had crossed Kent street and started north on the west side of Bloomington street just as Cramey was leaving Kent street on his way north down the decline of Bloomington street towards the railway. Dean had heard the train whistle at the river and again at the viaduct. He called out to Cramey "Look out," or "There is a train" or some such words. Cramey did not stop or slacken his speed and Dean did not know whether Cramey heard him. The witness Baum was coming south from north of the track. He heard the train whistle and saw it coming under the viaduct. He hurried south across the track. Then he saw Cramey coming down the middle of the street towards him, on his bicycle. He stepped from the sidewalk into the gutter, threw up his hand and waved it and shouted to Cramey: "You had better wait; the train is right here." Whether the witness intended to say Cramey was then forty feet or forty yards from the track, is not certain, but he probably meant forty feet. Baum testified that he was then only three or four steps from Cramey, that Cramey looked directly at him when he said this, and that he knew Cramey heard him, and that when Cramey looked at Baum the coming engine was directly in range behind Baum as he stood facing Cramey, so that Cramey must also have seen the engine. Baum testified that Cramey made some reply which he did not understand, and then dropped his head and started on at a greater speed. Baum testified that another man some distance away put up both hands and exclaimed, "Oh, my God." Maggie Little was riding east on Kent street, in a milk wagon, with her back to the ap-

proaching train. She testified the engine did not whistle nor the bell ring. As she was going from the train and not approaching the crossing she had no special occasion to notice the train signals. She however testified that the train was coming, but did not state how or when she learned that fact. She knew Cramey, as he bought milk at the dairy of her family. She saw him going north on Bloomington street near the railroad, and she saw a man on the north side of the track motioning. This man waved his two hands and shouted loud enough so that she heard him on Kent street, though she did not hear or remember what he said. If this was the same man about whom Baum testified, then Cramey was warned by three different persons; if it was another person, then Cramey had four warnings. Three witnesses (one of them called by plaintiff) testified to facts tending to show that after receiving at least the second of these warnings Cramey increased his speed in an apparent effort to cross the track ahead of the train. While two or three of plaintiff's witnesses who were not very near judged that Cramey's bicycle reached the nearest rail of the track and was struck by the cow catcher, we think the evidence establishes that the cow catcher did not strike the bicycle or Cramey, but that the bicycle struck the engine between the pilot beam and the cylinder head.

Cramey was about 25 years old. He spoke English well. He was possessed of the usual faculties. We think it the only reasonable conclusion that what so many others in the vicinity saw and heard and knew he also knew; that at least the warning given by Baum was heard by him, and that he was careless and reckless, and in consequence ran into the side of the engine and was thereby killed. We think what was said by this court in *C. & Q. Ry. v. Thorson*, 68 Ill. App., 288, on pages 292 to 294, is applicable, and that plaintiff cannot recover.

It is therefore unnecessary to determine whether recovery could be had for the benefit of alien next of kin, resident in Syria.

The judgment is reversed.

Reversed.

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Finding of facts, to be incorporated in the judgment of the court:

We find from the evidence that George Cramey, plaintiff's intestate, was not exercising due care for his own safety at and just before the time he received the injury from which he died, and that his death was the result of his lack of due care.

Henry Blair v. William Blair.

Gen. No. 4,619.

1. *CROSS-EXAMINATION—what proper upon.* Upon cross-examination it is proper to inquire of a witness if she had any feeling against the party against whom she is testifying.

2. *IMPUTATION—right of party to rebut.* Where a witness upon cross-examination has testified that she has feeling toward the party against whom she is testifying and that she could not well be without feeling because of the way she had been treated by him, it is competent to rebut such imputation by parol testimony.

3. *NEW TRIAL—when should not be granted for surprise.* A new trial should not be granted on the ground of surprise at the trial where the party claiming such surprise had opportunity to forestall it.

Action of assumpsit. Appeal from the County Court of Livingston County; the Hon. C. F. H. CARITHERS, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

A. C. NORTON and R. B. CAMPBELL, for appellant.

C. C. and L. F. STRAWN, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellee sued his brother, the appellant, and filed a declaration containing only the common counts. With this he filed, besides a formal account, a copy of a note for \$400, dated November 10, 1896, due one year after date, signed by appellant and payable to appellee. Appellant filed a sworn plea denying the execution of the note, the general

issue, and pleas setting up the five and ten years' Statutes of Limitation. Replications were filed, and appellee had a verdict and a judgment.

It is proved and not denied that appellant previously owed appellee \$400 and gave this note on November 10, 1892, to evidence that debt, and that no part of it has been paid. Appellant claims it was dated 1892 and has since been changed to 1896 to avoid the ten years' Statute of Limitations. He also relies upon what he claims is an evident appearance of an alteration in the date of the note, a photographic copy of which has been certified to us, with a photographic enlargement of the date. On November 10, 1892, appellee had been visiting with his mother and his brothers, James and Henry, all of whom lived in the same house in this State, and he was to return that day to his home in Kansas. He proposed some adjustment of the debt Henry owed him. According to the testimony of appellee and James, Henry said he could not pay then nor all at once, but would pay \$100 per year for four years. We think it a fair conclusion from all their testimony that it was agreed Henry should have that time in which to pay; and that to save appellee the necessity of coming back from Kansas in case Henry did not pay within the four years, Henry was to give this note, dated ahead to 1896, the end of the four years; so that appellee could have that to rely upon if the debt was not previously paid. Not all they testified harmonizes exactly with that theory, and they do not very closely explain why Henry was then to have another year's time; and it may be the arrangement was not very clearly understood. But it is agreed that Henry wrote the note, and if he got a year longer in which to pay than was really intended, it was his act. The note was on a printed form, and the figures "18" are printed. The figures "96" in the date are rather heavily and bunglingly made, and there are indications that a "2" was written and then changed to "6." But Henry may have first unconsciously written the real date, and then changed it to "6" to conform to the arrangement they were making. Appellee and James

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testify that Henry started to write the note, and complained of the pen; that James then went to his room and brought a fountain pen; that Henry dipped it in ink and James told him not to dip it as it was already filled; and that Henry then wrote or finished writing the note. He may have retraced the date with this pen, liable to write an unnaturally broad and heavy stroke because unnecessarily dipped in ink. Appellee and James both testified positively that the note when introduced appeared exactly as when Henry wrote and delivered it, and that it had not been altered. They also testified their mother was about the house but that they did not remember whether she was in the room. Appellant, whose business is tending bar in a saloon, denied this testimony about the ink and the change of pens, and testified that he wrote the date 1892, and so delivered it, and that James was not at home that day. The mother testified that James was not at home that day; that she knew a \$400 note was given, but that she did not hear the conversation and did not know what the arrangement was. Mrs. Blair was seventy-five years of age when she testified, was speaking of a matter which took place over twelve years before and which did not personally concern her, and she admitted she is not now on friendly terms with appellee. This was the place where James lived; it was natural he should be at home the day his visiting brother was going to end his visit and start for Kansas; and neither appellant nor the mother tell where James was or give any reason for remembering that on a particular day twelve years before he was not at home. We cannot say the jury and the trial judge ought to have reached a different conclusion from this proof. It may be the note has been altered to avoid the Statute of Limitations, but that was a question of fact for the jury, and their verdict is in harmony with the apparent preponderance of the evidence.

It was proper to inquire of Mrs. Blair on cross-examination whether she had any feeling against appellee, and when she replied that she thought any one would the way they had used her, appellee was not bound to rest under that im-

putation, but had a right to elicit from her that she referred to the fact that she had been placed under a conservator at the instance of certain of her children. It was not necessary to prove that fact by the record, for appellee was only requiring her to explain an ill-natured remark she had made which in fact referred to the conservatorship. She introduced the subject; and it was not original impeaching testimony by appellee, as appellant assumes. Mrs. Blair testified she did not pay much attention to what appellant and appellee said that day, that they talked low among themselves, and that she had testified to all she had heard them say; and it was not error to refuse to permit appellant to ask her, on redirect examination, if she could have heard all the conversation if she had cared to listen. An answer either yes or no would have been immaterial.

The jury were plainly instructed, at the request of appellant, that if the note sued on was given and dated on November 10, 1892, and the date afterwards changed to 1896 without the knowledge or consent of appellant, then the verdict should be for appellant; and other instructions given for appellant were to the like effect; and while one or two of the instructions given for appellee might have been improved in form, yet none of them were misleading or erroneous, and they did not conflict with those above mentioned given for appellant. We find no reversible error in the action of the court on the instructions.

On the motion for a new trial, appellant and his attorney filed affidavits that they were taken by surprise at the trial; that they did not suppose there would be any claim by appellee that the note was executed on any other date than November 10, 1896, and that they had prepared their defense solely with reference to that date. This suit was begun and tried in 1904. If they supposed the suit related to a note given in 1896, why did they plead the ten years' Statute of Limitations? Appellant's testimony shows he knew he had given appellee but one note, and that that was for \$400 and was given November 10, 1892. The copy was dated 1896. He therefore knew (taking his testimony to be

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issue, and pleas setting up 'the five and ten years' Statutes the truth as he remembered it) either that the copy was an error and that at the trial the date of the note would be found to be 1892, or else that the date of the note had been changed. It seems obvious that he pleaded the ten years' statute to meet the note if it was dated 1892, and non-execution of the note to meet it if it was dated 1896. Again, appellant could have obtained a complete disclosure of the cause of action by asking for a bill of particulars. Further, it is not shown that appellant can produce any more proof at a new trial. The motion for a new trial was made December 14, 1904. The affidavits of appellant and his counsel were sworn to December 29, 1904, and January 10, 1905, and they state that if given a little time they hope to produce witnesses to testify where James was on November 10, 1892, and that he was not at home. On February 17, 1905, the court continued the motion for a new trial, and it was heard on July 20, 1905. The expected proof was not produced. It was shown that witnesses had heard James say he and appellee would do anything to beat appellant, and one witness was not sure but he had heard James say they would swear to anything to accomplish that result. Other affiants spoke well of Mrs. Blair's mental powers. It was also shown that her conservator has since been discharged. We find nothing in this requiring a new trial.

The judgment is therefore affirmed.

Affirmed.

John Hueni v. Michael F. Freehill.

Gen. No. 4,616.

1. VERDICT—*interest allowable upon.* Interest may properly be allowed upon a verdict.
2. VERDICT—*when allowance of interest upon, ineffective.* Where the court allows interest upon a verdict but fails to compute the same and add it to the principal of the verdict, it is ineffective and an execution can only issue for the amount of the verdict.
3. VERDICT—*when small excessiveness of, will not reverse.* The

mere fact that a verdict is excessive by a few dollars will not reverse, the maxim *de minimis non curat lex* applying.

4. CONVERSATION—*proof of, competent, notwithstanding one of parties to, is dead.* Proof by a witness to a conversation, if otherwise material, is competent notwithstanding one of the participants in such conversation is dead.

5. CONTRACT—*may rest part in writing and part in parol.* A contract may rest partly in writing and partly in parol; and the parol portion may be established by oral testimony.

6. COUNTS—*when election under, need not be made.* In this case it was held that it was proper not to require the plaintiff to elect under which count he would proceed where one of such counts was for the conversion of merchandise and the other for the conversion of the proceeds of such merchandise after its sale.

7. INSTRUCTIONS—*when references to evidence, proper.* Instructions which tell the jury that "if you believe from the evidence," are proper; it is not necessary that the phrase "if you believe from a preponderance of the evidence" should be employed.

8. INSTRUCTIONS—*when confusion in modifications will not reverse.* Where the modifications of instructions are inserted in wrong places, thereby causing some confusion, a reversal will not follow unless it is apparent that the jury were misled.

Action of trover. Appeal from the Circuit Court of Livingston County; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

R. S. McILDUFF, for appellant.

A. C. NORTON and R. B. CAMPBELL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This case was before us at a former term, and our opinion is reported in *Freehill v. Hueni*, 103 Ill. App., 118. On page 123 of that opinion the word "plaintiff" at the end of the first paragraph should be "defendant," and in the next to the last sentence of the opinion the word "conversation" should be "conversion." That opinion contains a full statement of the case, and it will not be repeated here. After the cause was remanded to the court below various changes in the pleadings were made, and the cause was finally tried upon two of the counts of the original declaration, one for

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the conversion of the oats, and the other for the conversion of the proceeds of the oats after their sale; all proper pleas and replications being by agreement treated as filed. There was a jury trial in January, 1905, and a verdict of plaintiff for \$341.87. There was a judgment for that sum, to which judgment these words were added, "with interest thereon at the rate of five per cent. per annum from January 19, A. D. 1905, to the present date." That provision for interest is assigned for error. The date named was the date of the rendition of the verdict. The judgment was in April following. Section 3 of our statute on interest authorizes such an allowance of interest upon a verdict; but as the court did not compute the interest and find the amount thereof, it will not avail plaintiff, as the clerk can only issue an execution for the amount named in the judgment, and that judgment will only bear interest from its date.

The one meritorious question in this case is whether defendant did keep on hand the 880 bushels of oats delivered to him by plaintiff, and for which he issued his warehouse receipt, or other oats of like quantity and quality, to meet said warehouse receipt, or whether a few months after the issuance of this receipt he shipped out and sold all the oats in his warehouse and bins, thereby converting the oats to his own use. Upon this subject there was a direct conflict in the evidence, and there was evidence sufficient to sustain plaintiff's charge of a conversion. The condition of the proof is such that we would not be warranted in disturbing the verdict of the jury upon that subject.

Defendant insists the court erred in permitting plaintiff to prove a conversation between defendant and Best the next summer after the oats were delivered to defendant, in which, according to plaintiff's witness, defendant told Best in effect that he had shipped out all the oats and had no oats on hand to answer plaintiff's warehouse receipt. We fail to see the force of the objection. Best is dead, but that does not deprive plaintiff of the right to prove the conversation by another person who was present. Whether the witness was telling the truth or was actuated by some improper

motive to testify falsely was for the jury to decide. A statement made by a party to a suit concerning the merits of the controversy and against his interest may be proved in evidence against him.

The warehouse receipt set out in our former opinion does not state the grade of the oats. The court permitted plaintiff to prove that the oats plaintiff delivered to defendant were number 2 oats. We are of opinion this proof was properly received. A contract may rest partly in writing and partly in parol. If the writing had specified the grade plaintiff could not have contradicted it, but the receipt being silent on that subject it was proper to permit plaintiff to supply the omission.

Certain instructions given at plaintiff's request required defendant to have on hand oats sufficient to meet his outstanding warehouse receipts, and it is repeatedly asserted by defendant, appellant here, in his brief that the record conclusively shows that this was the only warehouse receipt outstanding. On pages 110 and 111 of the record it will be found that defendant testified that he had other storage certificates outstanding besides plaintiff's, probably one or two thousand bushels, and that he had just a few storage receipts out.

It is claimed the court should have compelled plaintiff to elect under which of the two counts above specified he would proceed. We find nothing in the record requiring or justifying such election.

Complaint is made of the action of the court upon the instructions. We find these complaints in the main without merit. Some of plaintiff's instructions said, "If you believe from the evidence," and it is argued that that was erroneous, and they should have read "If you believe from the preponderance of the evidence." This contention is without merit. Such instructions have been repeatedly approved as sufficient. We select a few cases at random. *Mt. Olive Coal Co. v. Rademacher*, 190 Ill., 538; *Chicago City Ry. Co. v. Hastings*, 136 Ill., 251; *Pennsylvania Co. v. Marshall*, 119 Ill., 399. In one or two cases in modifying defend-

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ant's instructions, the modification was inserted in the wrong place, so that the modification may have created some confusion. We find, however, that in the main the jury were well and sufficiently instructed, and that they could not have been misled.

It is claimed the verdict exceeds the amount due on plaintiff's theory by a few dollars. The excess claimed is too small to work a reversal under the rule *de minimis non curat lex*, but we find by computation that the verdict is not excessive.

We find no substantial error in the record and are of opinion that the judgment is just. The judgment is therefore affirmed.

Affirmed.

George L. Marion v. Courier Publishing Company.

Gen. No. 4,603.

1. **LIBEL**—*when words are actionable without proof of special damage.* A charge against a physician of unprofessional conduct in the treatment of a case is actionable without proof of special damage.

2. **LIBEL**—*effect of general statements of damage at conclusion of declaration.* A general statement of damage made at the conclusion of a declaration applies to each of the several counts thereof.

Action for libel. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

CHARLES B. HAZLEHURST, for appellant.

BOTSFORD, WAYNE & BOTSFORD, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

In an action for libel brought by George L. Marion against the Courier Publishing Company, plaintiff filed a second amended declaration, which will hereinafter be called the

declaration, defendant demurred thereto, the demurrer was sustained, plaintiff stood by the declaration, defendant had judgment for costs, and plaintiff appeals.

The declaration alleged that plaintiff was a resident of the city of Elgin, a lawfully licensed and practising physician and surgeon, of much practice, in good standing, and deservedly held of good ability, skill, credit, reputation and standing in his profession, by his neighbors and by those with whom he had dealings as such physician and surgeon; that defendant was editor and proprietor of a newspaper called the Elgin Daily Courier, printed and published daily by defendant in said city; that on and for many days before February 5, 1904, plaintiff as such physician and surgeon had been carefully and properly treating and caring for Eugene Dwyer for an injury sustained by him; that defendant, knowing the premises and maliciously intending to injure and destroy plaintiff's good name, reputation, credit, business and professional practice, and to cause him to become a physician and surgeon of no good name, reputation, occupation, and practice, did, on February 5, 1904, compose and publish in said newspaper certain false, scandalous, malicious, defamatory and libelous matters of and concerning the plaintiff, and his said business, practice and occupation. The article is then set out with innuendoes. The purport of the article is that plaintiff and other physicians were treating a boy named Eugene Dwyer in a hospital for a serious injury to his leg; that it was agreed by the physicians that the boy's leg must be encased in a wooden cast of a special make; that plaintiff was the only physician in that town who owned such a cast; that he permitted its use and it was applied to Dwyer's leg; that Thomas Dwyer, father of the patient, and plaintiff got into an altercation as to whether Dr. Pelton or Dr. Brown was the family physician; that Thomas Dwyer discharged plaintiff on the spot; that after the other physicians had left the hospital plaintiff called and requested the nurses to string the patient on a harness while plaintiff removed the cast; that the nurses refused to permit plaintiff to take off the cast, but that they

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took it off and delivered it to plaintiff; that if the patient had died that night, plaintiff would have been compelled to face a serious charge; that another cast was made to order and at noon next day another physician had encased the injured leg; that despite the treatment the boy had received he managed to pull through, and his parents believe he will recover; that since the accident Thomas Dwyer and plaintiff have had hot words as to who would administer treatment; that plaintiff was present when the boy was injured and accompanied him to the hospital; that plaintiff insisted on caring for him; that it is customary among the profession to permit the physician first on the ground to care for the patient till those in authority are consulted; and if a family physician is named it is the duty of the first physician to withdraw unless retained, and then to work in connection with the family physician. Most of the innuendoes are warranted by the language used. The innuendoes in the second and third counts that defendant intended to charge that plaintiff was a physician and surgeon of no ability, capacity, and skill, and did not know enough and was not competent to remove said cast, and therefore was not permitted to remove it, we think were not warranted by the words. Possibly one or two other innuendoes are subject to the same criticism.

But the article means that plaintiff became angry and required the removal of his cast from the boy's leg; that it was not proper and skillful treatment of the patient to remove the cast at that time, but on the contrary that it was perilous to the patient and might have caused his death, and if the patient had died that night, plaintiff would have been compelled to answer a serious charge. The apparent meaning is that plaintiff would have been compelled to answer the charge of causing the boy's death. The article plainly charges plaintiff with unprofessional conduct in his treatment of the case. Where such a charge is made against a professional or business man, about his conduct of his profession or business, the words are actionable without allegation or proof of special damage. *Nelson v. Borchenius*, 52

Ill., 236; Clifford v. Cochrane, 10 Ill. App., 570; McDonald v. Lord, 27 Ill. App., 111; Gerald v. Inter Ocean Publishing Co., 90 Ill. App., 205. At the close of the declaration it is charged that by means of the committing of such grievances by defendant, plaintiff has been injured in his good name, credit, reputation, business, profession, practice and occupation as such physician and surgeon, and brought into public scandal and disgrace, and has been shunned and avoided by divers persons, etc. The precedents authorize such a statement of general damage at the end of all the counts, applicable to each. 2 Chitty on Pleading, 625 to 631. The article and the innuendoes properly framed state a cause of action. Defendant's argument is to some extent based upon the supposed truth of part of the article; but the declaration charges that the article is false, and the demurrer admits that allegation.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Pioneer Fire-Proofing Company v. James Clifford.

Gen. No. 4,402.

1. CONVICTION OF CRIME—*what competent as affecting credibility of witness.* To affect the credibility of a witness it is only competent to show the conviction of such a crime as at common law excluded the person convicted from being a witness in either a civil or a criminal case.

2. FELLOW-SERVANTS—*when refusal of instruction upon rule of error.* The refusal of the court to instruct the jury as to the law of fellow-servants is error where such question was one of the important issues in the case and no other instruction upon the question was given.

3. FELLOW-SERVANTS—*when co-servants may be, notwithstanding in employ of different masters.* The relation of fellow-servants may exist between the employes of different masters where the employes of one of such masters have been loaned to the other and all are under the direction and control of a single master.

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Action on the case for personal injuries. Appeal from the Circuit Court of LaSalle County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

MCDougall, Chapman & Bayne, for appellant.

HUTTMANN, BUTTERS & CARR, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellee was injured by being caught between two cars of appellant in its clay bank or pit east of the city of Ottawa; when appellee was at work for appellant, and he sued appellant to recover damages for such injuries. The cause was before us at a former term. *Pioneer Fire-Proofing Co. v. Clifford*, 118 Ill. App., 457. After that decision there was another trial below, and a judgment for appellee. Material and controverted questions of fact upon the second trial were, whether appellee was injured because of a risk which he assumed; whether he was injured because of his own negligence; whether he was injured because of the negligence of William Foster, also employed in the clay bank; and, if so, whether Foster and appellee were fellow servants, so as to relieve appellant from responsibility for the consequences of Foster's negligence. Eugene Myers was an important witness for appellant on these questions, and it is insisted here by appellee that the jury did not believe him and should not have done so.

In that state of the case, appellee, over repeated objections and exceptions by appellant, was permitted to draw out from Myers, on cross-examination, that he had served three years in the penitentiary at Joliet under a sentence by the Circuit Court of LaSalle county. The statute which permits such oral proof by way of impeachment in civil cases, does not authorize proof of the conviction of any crime, but only of a conviction of an *infamous* crime,—that is, of such a crime as, at common law, excluded the person convicted from being a witness in either a civil or a criminal case. *Bartholomew v. People*, 104 Ill., 601; *Matzenbaugh*

v. *People ex rel.*, 194 Ill., 108; *Lamkin v. Burnett*, 7 Ill. App., 143; *Burke v. Stewart*, 81 Ill. App., 506; *Daxenbecklar v. People*, 93 Ill. App., 553. Imprisonment in the penitentiary is imposed as a punishment for crimes which are not infamous. Appellee did not show that Myers had been convicted of an infamous crime, and seems to concede here that he had not been so convicted. Appellee could not put in the proof he did and cast on appellant the burden of showing why Myers was sentenced to the penitentiary. Appellant might be taken by surprise and might not know what the fact was; and, besides, appellant was not required to introduce proof to show whether appellee's proof was competent. This evidence was repeatedly objected to, and it was not shown to be competent, and therefore it should not have been admitted. Once admitted, its evil influence with the jury was not likely to be overcome. If appellee's contention is correct, a cross-examiner can compel a witness to testify to his incarceration for a crime, and get the full benefit of that impeaching testimony before the jury, even if he knows it was not for an infamous crime. We cannot sustain that position.

The court refused the 29th instruction, requested by appellant. It correctly defined fellow servants, and stated the law as to the non-liability of an employer for an injury to one servant caused by the negligence of a fellow servant of the injured party; and it applied that law to this case. No instruction was given upon that subject, and appellant was deprived of an important legal proposition upon which it had the right to have the jury instructed, unless under the facts the jury could not find the relation of fellow servant to exist. Robert Cannon had a coal yard and a feed yard and kept teams in the city of Ottawa. Appellee was in his employ. Cannon let appellee and a horse to appellant for a stipulated price. Appellant paid Cannon for the services of the horse and man, and Cannon paid appellee. Appellee would drive to the pit each morning and then with the horse haul both loaded and empty cars between the main track and the place of loading at the face of the bank. Foster was in

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the employ of appellant doing the same kind of work with another horse. It is contended that Foster and appellee were servants of different masters, and that therefore the doctrine of fellow servants cannot apply, under *John Spry Lumber Co. v. Duggan*, 182 Ill., 218, and *C. & A. R. R. Co. v. Harrington*, 192 Ill., 9. In the first of these cases, Duggan was one of a gang of men hired by Hunt to unload a boat load of lumber under a contract Hunt had with the lumber company. They worked under Hunt's directions, and passed the lumber from the vessel to the dock. The lumber company had servants who received the lumber and piled it on the dock, and they did that work so negligently that as Duggan passed along the dock after he had left his place of work, the lumber fell upon and injured him. It was held that the employees of the lumber company who piled the lumber on the dock were not fellow servants with Duggan, working for Hunt in a different employment. In the second case *Harrington* was a member of a switching crew of the Clover Leaf road, and was injured by the negligence of a switching crew of the C. & A. R. R. Co. in departing from a switch and leaving it open. It was held the latter crew were not fellow servants with *Harrington*. In each of these cases, the different sets of men were laboring under the direction of different employers, and at distinctly different work. Here appellee was wholly under the direction and control of appellant from morning till night at the clay bank, and he worked with appellant's other men in the pit without any distinction. The facts are similar to a case where a father contracts to another the services of his minor son, and collects his pay, but the son while at work is wholly under the control and direction of the employer. In our judgment such a minor child could be a fellow servant with the other persons working for the common master. *Hasty v. Sears*, 157 Mass., 123, is in point. It was there held that where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he was lent;

and if such servant received injuries in such employment from the negligence of a servant of the person to whom he was lent, the doctrine of fellow servant applies. To the same general effect is *Coughlan v. Cambridge*, 166 Mass., 268; *Anderson v. Boyer*, 156 N. Y., 93; *Ewan v. Lippincott*, 47 N. J. Law., 192; and *D. L. & W. R. R. Co. v. Hardy*, 59 N. J. Law., 35 and 562. The case of *Ill. Central R. R. Co. v. Cox*, 21 Ill., 20, applies the same rule, though without discussion. See also *Consolidated Fire Works v. Koehl*, 190 Ill., 145. In 12 Am. & Eng. Ency. of Law, 2nd. Ed. 996, the principle here involved is thus stated: "The general servant of one person may become the servant of another by submitting himself to the control and direction of the other. In such a case the servant becomes the fellow servant of the servants of the person under whose control he comes; and neither his general master nor his special master is liable if he is injured by the negligence of one of the other servants." All the reasons for the fellow servant rule apply here, and in our judgment the fact that Cannon made the contract and drew the compensation from appellant, and paid appellee a sum which covered not only these services but also whatever he did for Cannon at the feed yard nights and Sundays, does not prevent the application of the doctrine of fellow servant to this case, and therefore the instruction should have been given. Whether the other facts made Foster and appellee fellow servants, was a question for the jury under proper instructions.

The declaration apparently does not deny that appellee assumed the risk, or state facts from which that can be implied. It is open to question whether it avers that the negligence which resulted in the injury to appellee was not that of a fellow servant. The first instruction given at the request of plaintiff directed a verdict for plaintiff if he was injured by the negligence of defendant as charged in the declaration, while he was in the exercise of ordinary care. As the cause must be tried again, we suggest to counsel whether this instruction did not deprive appellant of the defense of assumed risk, and perhaps also that of fellow

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servant, under I. C. R. R. Co. v. Smith, 208 Ill., 608, and Terra Cotta Lumber Co. v. Hanley, 214 Ill., 243.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Eliza DeClerque v. George W. Campbell, Administrator.

Gen. No. 4,599.

1. *APPEAL—from what does not lie.* An appeal does not lie from an order vacating a judgment; such an order is purely interlocutory.

2. *STATUTE OF LIMITATIONS—effect of filing of claim upon.* The effect of filing a claim in the court of probate is to arrest the running of the statute against such claim.

3. *ADMINISTRATION OF ESTATES—what does not deprive court of jurisdiction over claim.* The filing of a claim against an estate in the course of administration vests the court with jurisdiction thereof and the failure to continue the hearing upon the claim from term to term does not deprive the court of such jurisdiction; the only effect of such failure is to require the claimant to give the administrator notice of the hearing upon the claim.

Contest in court of probate. Appeal from the Circuit Court of Peoria County; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

COVEY & COVEY and WINSLOW EVANS, for appellant.

ARTHUR KEITHLEY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Eliza DeClerque held six promissory notes upon which Charles H. Powell was guarantor. If nothing had intervened to arrest the ten years' Statute of Limitations, the note first maturing would have been barred on January 8, 1903, and the last one maturing would have been barred on July 3, 1903. Charles H. Powell died on August 12, 1902.

George W. Campbell qualified as his administrator in the Probate Court of Peoria county, December 31, 1902. He fixed upon the March term, 1903, for the presentation of claims against the estate. On March 16, 1903, at said term, Eliza DeClerque filed in said court a claim against said estate upon said notes, together with a written consent by the administrator for the allowance of said claim in the sum of \$1872.14 and on March 17, 1903, it was allowed in that sum as a claim of the seventh class. On May 20, 1903, the widow of deceased entered a motion in said court to set aside such allowance. On June 1, 1903, the Probate Court vacated the judgment allowing said claim. On June 15, 1903, claimant prayed for and was allowed an appeal to the Circuit Court from the order vacating said judgment, and filed an appeal bond, which was approved. It is alleged by one party that on that appeal the claim was once allowed in the Circuit Court, and the judgment afterwards vacated, but we find no such proof in this record. On May 11, 1904, claimant dismissed her appeal in the Circuit Court, and a *procedendo* to the Probate Court was ordered. The *procedendo* was issued June 6th, and served June 30, 1904. The claim came on for hearing in the Probate Court, and on October 26, 1904, it was allowed at \$1986 as of the seventh class. From that allowance the administrator prosecuted an appeal to the Circuit Court, where the claim was tried without a jury, and the issues were found for the estate, and the administrator had a judgment for costs, from which judgment claimant prosecutes this appeal. The sole question is whether the claim is barred by the ten years' Statute of Limitations.

The right of action upon these notes had not been barred when Powell died. Section 19 of our statute gave the owner of the notes one year after letters of administration within which to commence an action thereon against the administrator. That year began to run December 31, 1902. The claim was filed with the written consent of the administrator to the allowance of the claim, and the claim allowed, in March, 1903. The claim had not then been barred. It was

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not barred when the widow procured the vacation of that allowance. The effect of that vacation was to leave the claim pending in the Probate Court for trial. The attempt by claimant to appeal to the Circuit Court from the order vacating the judgment was void. That order was interlocutory only and not appealable. That appeal did not have the legal effect of removing the claim to the Circuit Court or give that court any jurisdiction of the cause. The claim remained in the Probate Court, without action from June 11, 1903, when the judgment was vacated, till it was again tried in that court, which seems to have been October 26, 1904, the day when it was allowed. The clerk of the Probate Court testified that he had examined the records of his court in the case of this claim, and that there was no order continuing the claim from term to term, or from month to month, or to any time. The argument is that for want of an order continuing the claim from term to term the claim was discontinued at the close of the June term, 1903, and that the ten years' statute had therefore barred it before the date of its allowance on October 26, 1904.

Appellee relies upon *Propst v. Meadows*, 13 Ill., 157; *Reitzell v. Miller*, 25 Ill., 67; *Schneider v. Foote*, 71 Ill. App., 410; and *Viskniskki v. Bleakley*, 88 Ill. App., 613. *Propst v. Meadows* was a bill in equity to set aside the allowance of a claim without notice to the executor. It was there said that if claims are not finally disposed of at the term fixed by the executor for the presentation of claims, they must be continued by order of court to some specified time, or be presented again under the statute. In *Reitzell v. Miller*, the August term, 1850, was designated for the presentation of claims. Miller's claim was not filed till May 7, 1852. It does not appear that any steps were taken to notify the administrators or to bring them into court till the March term, 1859. The claim was on an open account, and was due when the intestate died in April, 1850. The statutory bar of five years was complete before any notice of the claim was given the administrators. The court said that if the filing of a claim was the commencement of a suit

so as to stop the running of the Statute of Limitations, it must be at the time fixed by the administrators for the adjustment of claims, and if not acted upon at that term must be regularly continued from term to term, or a discontinuance takes place, and the case is no longer in that court, and to again become a pending suit the administrators must be brought into court by the notice prescribed by statute. In *Schneider v. Foote*, letters were issued April 29, 1890, and the June term, 1890, was fixed for the adjustment of claims. The claim there in question was filed November 17, 1891. No notice was given the executors nor was there service of summons upon them. On January 26, 1897, the executors appeared and resisted the claim. The claim, which was for services, was held to be barred. In *Viskinski v. Bleakley*, letters were issued March 29, 1897. The June term, 1897, was fixed for the presentation of claims. The claim there in question was on an open account, the last item of which was May 17, 1893. The claim was filed October 2, 1897. No summons was issued for the executor, nor was he notified, nor did he then appear. The claim was heard April 14, 1899. There was no summons or appearance till after the five years' statute had run. The claim was held barred. It will be seen that in each of these cases, except *Propst v. Meadows*, the claim was not filed till after the expiration of the term fixed for the presentation of claims, and no summons was sued out nor was the personal representative notified nor did he appear till after the bar was complete, unless the statute was arrested by the mere filing of the claim after the expiration of the term fixed for that purpose. It is obvious that no jurisdiction was acquired till after the bar was complete.

What was said by the Supreme Court in the two cases first above cited was afterwards qualified by that court in *Barbero v. Thurman*, 49 Ill., 283. There the claim was filed at the appointed term, continued twice, then left off the docket for over three years, then redocketed, continued twice and then tried. The question there was whether there had been a compliance with the statute requiring claims to be

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exhibited within two years. The court said claimant had literally complied with the statute in filing the claim on the first day fixed by the administrator, and added: "What matter that the clerk neglected to keep it on the docket or that there was no special order of continuance from term to term? Granting that this rendered a new notice to the administrator necessary before allowing the claim, yet it did not affect the fact that the claim had been exhibited within the time and in the manner required by the statute, and the bar of the statute saved." The court also there said that the point really decided in *Propst v. Meadows* was that a claim filed at the time appointed, but not adjudicated, and not continued by express order, cannot be taken up and allowed at a future term without notice to the administrator or his presence; and that in *Reitzell v. Miller*, the court merely decided that filing a claim at a time not appointed was not such a commencement of a suit as to stop the running of the general Statute of Limitations. In *McCall v. Lee*, 120 Ill., 261, letters were issued May 10, 1879. The claim there in question was filed April 11, 1881. It was continued by agreement to await the result of another suit. In August, 1883, it was reinstated after notice to the executors. It was argued it was error to reinstate it as the clerk had omitted to continue and keep the case on the docket from term to term. The court said the executors must have had notice of the original filing of the claim, as they agreed to its postponement to await the decision of the other cause, and added: "The claim having been filed in time, it made no difference whether the clerk kept it on the docket or not, so long as there was no order in any manner disposing of it." It was held in *Ward v. Durham*, 134 Ill., 195, that by giving notice to creditors of the estate to present their claims for allowance at a certain term, the executrix gave the court jurisdiction of her person at that term and jurisdiction of the subject-matter of claims filed at that term.

In the case before us the claimant filed her claim at the term fixed therefor by the administrator, together with his consent to its allowance at a specified sum. The court there-

fore at that term had jurisdiction of the subject-matter and of the administrator. The claim was then allowed, and afterwards the allowance was vacated on the application of the widow. The claim then stood before the court for trial. The court therefore had acquired jurisdiction of the claim and of the defendant before the Statute of Limitations had run against the debt, and the running of the statute was thereby arrested. Was there a discontinuance of that case thereafter, —a loss of that jurisdiction,—so that the running of the statute was resumed? Ignoring what is said in the above cases applicable only to the statute requiring the presentation of claims to the Probate Court within two years after the issue of letters, we think the proper conclusion from the more recent of the above decisions is against the loss of jurisdiction. Our conclusion is that the claim remained pending before the Probate Court, but that, in the absence of express orders of continuance from term to term or time to time, it was necessary to notify the administrator before the claim could thereafter be taken up for trial. In the present case the cause, so far as appears, remained upon the docket of the County Court but no order was entered specially continuing that claim from term to term. If the cause was thereby discontinued, it would be necessary to refile the claim at some later term, but the later cases are that all that is necessary is to serve notice on the administrator that the claim will be called up for trial at a certain date or term. The jurisdiction of the court over the claim is treated as remaining notwithstanding the absence of express orders of continuance. We conclude that this claim was not barred.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

**Illinois Central Railroad Company v. William C. Kerr,
Administrator.****Gen. No. 4,611.**

1. *PASSENGER—when carrying beyond station does not render carrier liable for death of.* Held, from the facts of this case, that the death of a passenger did not proximately result from her being wrongfully carried beyond her station and that the carrier was not liable as such death was produced by other causes.

2. *NEGLIGENCE—when carrier not liable for.* A carrier of passengers is only liable for the direct and proximate results of the negligence complained of or for those results which can reasonably be anticipated to flow therefrom.

3. *PRESUMPTION—when will not sustain liability for negligence.* A liability for negligence will not be sustained where predicated upon one presumption based upon another.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Stephenson County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1905. Reversed, with finding of fact. Opinion filed March 10, 1906.

J. H. STEARNS, for appellant; J. M. DICKINSON, of counsel.

DOUGLAS PATTISON, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Some five years before the death of Mrs. Nellie Kerr, an operation was performed upon her, by which the abdominal region was laid open in front, from the navel downward. At that or some later time, her left ovary was removed. She was in ill health thereafter, her chief trouble being in the region of the bowels. From January 19 to March 22, 1904, she was under treatment by Dr. Stealy, of Freeport, who found her complaining of pain in the lower left abdomen, with stomach trouble. He found symptoms which he attributed to adhesions, due to previous trouble in the abdomen. This was accompanied by constipation. He used massage, electricity and internal medicine; this treatment

being designed to produce absorption of the adhesions. On September 9th, she came to Dr. Stealy again, and was very much worse in every respect. She had vomiting at times, and much gas in the bowels, with pain and distention. He found a mass in her left side as large as his two fists. The symptoms of adhesion had increased so much as to give very marked evidence of obstruction of the bowels, though not of complete strangulation. Dr. Stealy advised a surgical operation. She went home to consult her husband, and did not return to Dr. Stealy. About the middle of September, she went to the sanitarium of Dr. White at Freeport. He found distress in the bowels, and concluded there were chronic adhesions along the line where the abdomen had been opened and closed again at her former operation. He found a distention of the colon, and concluded that part of the intestines adhered to the front wall of the abdomen. The patient was constipated. He used injections, salt packs, and massage of the abdomen, the purpose of the massage being to overcome the adhesions. She had great tenderness all over the abdomen. She remained at the sanitarium under this treatment some six or seven weeks, and then went to her home, and came to the sanitarium occasionally for treatment. On the morning of Tuesday, November 22, 1904, she was at the sanitarium, and was examined by Dr. White. The patient was laid upon a table and Dr. White manipulated the abdomen bi-manually, that is, externally and through the vagina, and examined the womb and remaining ovary. This was a special examination, for the purpose of determining whether it would be worth while to continue the massage treatment, and also to make a record of her condition. He found the distress through the bowels relieved, and concluded that the treatment she had received was releasing the adhesions, and that her general condition was improved. He did not discover anything that morning of an acute nature, nor any symptoms of a stoppage of the bowels. He testified he did not get time to treat her that morning, as she had to go home on the train.

Wadham, the home of Mrs. Kerr, is about seventeen miles west of Freeport on the Illinois Central Railroad. She left

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Freeport for home that morning about half past eleven on a westbound passenger train, which was somewhat late. She had a commutation ticket, good between Wadham and Freeport, which the conductor punched. The first station west of Wadham was Nora and the next Warren. In the seat with her was Mr. Deam of Warren, with whom she was acquainted. Wadham and Nora were flag stations where that train stopped only on signal. The conductor failed to give the signal to stop at Wadham, and the train went through that village at its usual speed of from 35 to 50 miles per hour. When she exclaimed that she was being carried by her station, either Deam or the brakeman went forward and notified the conductor. The conductor went back and talked to Mrs. Kerr. Deam testified that there was a car between the ladies' car in which Mrs. Kerr was riding and the smoker in which the conductor was found, and that as they went back Mrs. Kerr had left the car in which she had been riding and had come forward into the next car, and was met by the conductor there; but the clear preponderance of the evidence is that there was no such car in the train; that there was but one car between the diner and the smoker, and that Mrs. Kerr was riding in that car, and was found by the conductor in that car. She talked with the conductor, and stood in the aisle leaning against the seat. He expressed his regret, and told her the only thing that he could do was to buy her a ticket and send her back on the first train, and that his train did not stop at Nora, and she had better go on to Warren, and that Warren was a larger town and a nicer place for her to stay in till the train came than Nora. She replied that she had relatives both at Nora and at Warren, but she preferred to get off at Nora if he would stop the train, and he told her he would do so. During this conversation, she told the conductor she would make him trouble for carrying her by. The conductor stopped the train at Nora, and she got off there, and he paid the agent for a return ticket for her, and it was delivered to her. The waiting room was warm. She went in and sat down. The train left, and the station agent started for his dinner at four minutes after noon. When he returned at one o'clock, she was gone. She

went to a store and telephoned or caused a telephone message to be sent to her sister, Miss Mahon, who lived with her at Wadham, to come after her. Miss Mahon drove to Nora with a horse and covered buggy and at 1:30 p. m. found her at a store in Nora, and took her home, a distance of four miles. Where Mrs. Kerr was or what happened to her from noon till 1:30 p. m. is not otherwise disclosed.

Mrs. Kerr complained all the way home from Nora to Wadham of pain across the bowels. When she reached home she was suffering a great deal, and gradually grew worse. Next morning Dr. Kreider was called. He found her pulse feeble, features shrunken, extremities cold, and she had serious nausea. He used hot applications and injections, and made other efforts to relieve her, and came several times that day. Dr. White of Freeport came early Thursday morning. He found the abdomen distended and enlarged, and the patient vomiting every few minutes, and vomiting matter from the smaller intestines. She had spasms with intense suffering. Her lower bowels were completely paralyzed. There was no reaction from the intestinal canal. She was attended by the local physician several times that day. Early next morning she was taken to Freeport on a train, and taken to a hospital. She had had no passage of the bowels since her sister met her Tuesday at Nora. Dr. White and others performed an operation, opening the abdominal tract. A pint or more of fluid came forth, indicating peritonitis. They opened the intestines and let out the gas. They found that the intestines adhered to the line of the cut made at the operation five years before. Deeper in the abdomen they found an adhesive band across the pelvis. The intestines had slipped behind this band and twisted, producing strangulation or a complete stoppage. From nine to twelve inches of the intestines were practically gangrened. They had much difficulty in keeping the patient alive during the operation. After the adhesive band had been broken, the bowels resumed their usual functions. The attending physicians cleansed the abdomen, made an artificial opening from the exterior of the body into the intestine to let out gas and putrid material, and closed

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the rest of the opening, taking such precautions as they could for the benefit of the patient. She died that afternoon. The immediate cause of her death was the strangulation of the intestine, and the collapse and peritonitis attending the strangulation.

William C. Kerr was the husband of Nellie Kerr. He took out letters of administration upon her estate, and then brought this suit against the Illinois Central Railroad Company, to recover damages for causing her death, and thereby depriving her next of kin of their means of support. The declaration stated the relation of carrier and passenger, and that Mrs. Kerr was carried past her station to Nora, as above set out. The first count averred that she was made sick by the excitement and exposure caused by her being carried beyond her destination, and died therefrom; and that carrying her beyond her destination was the direct and proximate cause of her sickness and death. The second count charged that by reason of her being carried by Wadham and being compelled to return thereto, she sustained great mental excitement, nervous shock and physical exposure, whereby she immediately became sick, and died therefrom; and that carrying her beyond her destination was the direct and proximate cause of her sickness and death. Defendant pleaded the general issue. There was a jury trial. Plaintiff had a verdict of \$1,000 and remitted \$5 therefrom. A motion by defendant for a new trial was denied, and plaintiff had judgment for \$995. Defendant appeals.

Ingenious theories by expert witnesses and by counsel are relied upon to sustain this judgment. We are convinced that the proof does not warrant the conclusion that the railroad company caused her death. There was no proof of any jolting or jarring of the train between Wadham and Nora. Mrs. Kerr received no physical injury on the train. She was treated with entire courtesy by the train crew, was furnished a return ticket and a warm and comfortable room in which to wait. She did not ask or appear to need any other or better accommodation. The only proof her wishes were not wholly complied with after the train failed to stop

at Wadham is that Deam testified the conductor was asked to back up to Wadham, and did not do it.

Three reasons occur to us why this judgment cannot be sustained.

1. We are asked to presume that this train jolted and jarred as it passed from Wadham to Nora, and that Mrs. Kerr, as she walked forward to the next car (if she did pass to another car), and as she stood and talked with the conductor, was thereby jolted and jarred; and then we are asked to presume that this jolting and jarring caused from nine to twelve inches of her intestines to slip behind this adhesive band and become strangulated. On another theory of plaintiff, we are asked to presume that being carried by her station produced in Mrs. Kerr a high state of nervous excitement, when the substance of the proof of excitement or nervousness most favorable to plaintiff is only that "She was wrought up considerable, and she was nervous, the same as anyone would that was disappointed or was left somewhere, and she was a good deal more that way because she was tired out;" "she was wrought up in a pretty high state, from the idea of having to go to Nora." Then we are asked to presume that this high state of nervous excitement caused the intestines to get wedged in behind the adhesive band. Upon any theory plaintiff may adopt, a presumption must be based upon a presumption, or an inference upon another inference, in order to find any possible ground for holding that by the act of carrying Mrs. Kerr past her station the railroad company caused her death. Such a method of arriving at a conclusion of fact is not admissible. The second presumption in such a chain cannot be indulged to sustain the essential allegations of the declaration upon which the charge of liability is based. *Globe Accident Ins. Co. v. Gerisch*, 163 Ill., 625; *Condon v. Schoenfeld*, 214 Ill., 226; *Illinois Steel Co. v. Byczynski*, 106 Ill. App., 331; *Byczynski v. Ill. Steel Co.*, 115 Ill. App., 326.

2. The second reason is in part a re-statement of the first. There is no proof which justifies the conclusion that the act of the company in carrying Mrs. Kerr by her station caused

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her death, or even contributed thereto. It is possible she was jolted and jarred, and that such jarring forced her intestines back of this adhesive band and produced strangulation. It is possible the jolt of stepping off the train caused it. It is possible it was caused by the bi-manual manipulation of her abdomen that morning by Dr. White. The final impetus may have been given while she was going to the depot in Freeport, or after she left the depot at Nora. A theory advanced by one or more experts suggests that these nine to twelve inches of intestines may have become strangulated behind this adhesive band by a gradual process; that they may have slipped behind the band to some extent a long time before her death, so as to produce partial constriction and the constipation complained of, and that this gradually increased till the final moment of complete strangulation; and that no one can tell that any particular movement or other cause completed the closing of the bowels.

3. But if this strangulation did occur between Wadham and Nora, we regard it as an unanswerable objection to this verdict that the sickness and death of Mrs. Kerr was not the direct and proximate result of her being carried by her station, and that her death could not reasonably be anticipated to result therefrom; and a defendant is liable, in such a case, only for the direct and proximate results, or for those results which could reasonably be anticipated to flow from the negligence complained of. The cases illustrative of that rule are collected and considered in *Braun v. Craven*, 175 Ill., 401. It is to be remembered plaintiff is not suing for a breach of the contract to carry Mrs. Kerr from Freeport to Wadham. She may have had a cause of action for that breach of contract, and may have been entitled to damages for loss of time and for any loss suffered by her from inability to meet some important engagement and the like. But the case here charged is that the railroad company caused her sickness and death, by carrying her four miles beyond her station. We consider it obvious that this verdict is wholly unwarranted by the proof. The judgment is therefore reversed.

Reversed.

Finding of facts, to be incorporated in the judgment of court: We find that the sickness and death of Mrs. Nellie Kerr, plaintiff's intestate, was not caused by any act or neglect of the defendant charged in the declaration.

William A. Gray v. Merchants' Insurance Company of Newark.

Gen. No. 4583.

1. *RES JUDICATA*—*when decision of Appellate Court is, upon hearing after remandment.* Where no new proof is introduced upon the hearing after remandment the decision of the Appellate Court is binding upon the trial tribunal.

2. *INSURANCE POLICY*—*provision of, with respect to loss of rent, construed.* An insurance policy which covers loss of rents includes loss of income where the premises in question were not demised for a specific term.

3. *ADJUSTER*—*acts of, binding upon company.* The acts of an adjuster are binding upon the company represented by him so far as such acts interpret the provision of a policy as to the loss intended to be covered thereby.

4. *AWARD OF ARBITRATORS*—*when cannot be questioned.* One who in his pleadings has set up and relied upon an award of arbitrators will not be permitted to assail the same.

5. *WAIVER*—*need not be specially pleaded.* Waiver need not be specially pleaded; proof thereof sustains an allegation of performance.

6. *ANSWER*—*must set up all defenses.* An answer in chancery must set up the defenses intended to be relied upon; defenses not so set up are deemed waived.

7. *INTEREST*—*may be recovered in action upon insurance policy.* Interest may be recovered in an action upon an insurance policy notwithstanding the question of liability is disputed.

8. *REFORMATION*—*what decree awarding, should contain.* A decree awarding reformation should be definite and the details of the reformation should be so set out that the decree itself without reference to the bill will show how the instrument in question is reformed.

Bill to reform, etc. Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded with directions. Opinion filed March 10, 1906.

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SHEEN & MILLER, for appellant.

McCULLOCH & McCULLOCH, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

This case was before us in 113 Ill. App., 537, and we need not repeat the full statement and discussion there given. After the cause was returned to the trial court, it went to the master, where each party introduced the same proof such party had introduced at the first hearing, and a little additional testimony. The master reported the proofs and his conclusions. The court sustained certain exceptions thereto and overruled others, and entered a decree reforming the policy, and allowing the rent of the stores and offices at \$120 per month for three months and three weeks, less one day, being the time covered by ninety-seven working days, with interest thereon, but refused to allow anything for loss of rents of the theatre, which was the larger part of the building insured and injured by fire. Complainant appeals, and defendant assigns cross errors.

Appellee insists that the merits are not concluded by our former decision, and reargues at length its former position that there was no mutual mistake in the policy. No further proof on that subject was introduced at the second hearing, and therefore the court below was bound by our former decision that appellant was entitled to a reformation. We have, however, re-examined the proof, and are still of the opinion that appellant and the agents of appellee did enter into an agreement that appellant should have the short form of policy only, and not the long form, and that the policy here in question, with the long form attached, was so issued and received by a mutual mistake between appellant and said agents, each intending appellant should receive the short form. If the agents, in their anxiety to get business, deceived the compact manager at Peoria, or even the officers of appellee at Chicago, or both, yet that is a matter between appellee and its agents only, and does not concern appellant who was not a party to any such deception.

Should appellant be allowed anything, and if so, how much, for the loss of rents of the theatre? The policy provided insurance against loss by fire "on rents of the three-story and basement brick, gravel roofed, building situated at No. 323 South Adams Street, Peoria, Illinois, and known as the Auditorium." Appellant's income on that building was chiefly derived from the theatre therein. It had been rented for annual rentals as hereinafter stated, but at the time of the fire it was not under lease, but was being managed and let by appellant to entertainments for a share of the receipts, though it was open to offers for rental. The master fixed the rental at the rate of \$3,600 per year, and the court allowed nothing. Appellee's position seems to be that if the building is rented the loss is that of the tenants unless appellant proved the contrary from the leases, and if the building is not rented then the landlord has lost no rents, and in either event the landlord can recover nothing under the policy. This would relieve appellee from all liability under the policy unless appellant proved affirmatively that the premises were leased and that his leases were so worded that his tenants were not liable for rent after a fire. Hence, appellant could not recover for loss of rents of the theatre because it was not rented at the time of the fire; and if any of the offices or stores had been vacated just before the fire and a new tenant had not yet been secured, appellee would be relieved from liability for loss of the rent of such office or store, even though it was desirable property and would have been speedily rented but for the fire. It would also follow that if any store or office was in the hands of a tenant from month to month only, or under a lease about to expire, and no renewal had been agreed upon or new tenant secured before the fire, appellee would only be liable for the loss of rent for the short unexpired term, for beyond that time no further lease had been made and therefore there were no further rents to lose. If this is the meaning of the policy, then the parties intended to provide premiums for appellee and to avoid protecting appellant against loss of income from his building as the result of fire. On the contrary, we think

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the object of such a policy is to protect the owner of the property. We held in *Niagara Fire Ins. Co. v. Heenan & Co.*, 81 Ill. App., 678, that a contract of insurance should be construed liberally in favor of protecting the assured; and in affirming that judgment, in 181 Ill., 175, the Supreme Court said: "A contract of insurance is a contract of indemnity, and unless indemnity for the loss sustained has been reached the law will lean to that construction which carries out the purpose of such a contract and gives such indemnity." Such is the general tenor of the Illinois decisions. Certainly appellee originally took the view that this policy was intended to insure against the loss of the use of the theatre, though under the management of appellant and not rented to a tenant at the time of the fire. Appellee's adjuster was its agent, and his acts were binding upon it, under the principles stated in *Phenix Ins. Co. v. Hart*, 149 Ill., 513, and *Home Ins. Co. v. Mendenhall*, 164 Ill., 458. On June 12, 1901, a month and six days after the fire, appellee's adjuster wrote to appellant from the Chicago office of the manager of appellee's western department, under appellee's official letter head, saying on this subject: "In the absence of any other data as to the rental of the theatre portion of the building, it would seem to me to be no more than equitable to use the basis of the lease existing before you took the management of the theatre, which for three years previous amounted to \$2,400 per year." The theatre had been rented at \$3,600 per year, and afterwards at \$2,400 per year with the addition of commissions each month on so much of the receipts of the theatre as exceeded \$800 for that month. At the time of the fire appellant was letting the theatre for a percentage of the rents to companies giving entertainments. It is obvious appellant was receiving an income from the use of the theatre for hire, but not in the usual form of fixing rent by a lease. We think the policy was intended to secure appellant against his loss of an income from the theatre, and was intended to cover its rental value. But appellant had not had as high a fixed rental from the theatre as \$3,600 per year

for several years. Its last fixed rental had been at \$2,400 per year, with the addition of a percentage on the monthly receipts above \$800, when they did go above that sum, and the proof is that under that lease, while in other parts of the year such percentage was a very substantial addition to the rental, there generally were no additions to the rent from that source during the summer months, as the receipts did not exceed \$800 per month during those months. This fire occurred May 6th, and the loss of rents or income from the theatre for which this policy is liable was during the summer months, and we conclude the liability for the theatre should be fixed at the rate of \$2,400 per year.

Appellant was allowed rentals for three months and three weeks less one day, being the actual time covered by ninety-seven working days. He claims he should have been allowed for five or six months, and assigns certain reasons why the arbitration on that subject should not bind him. Appellant and appellee submitted to two appraisers, and to an umpire to be selected by them, the question of "the time required to repair or replace the property damaged and destroyed by the fire." The award of any two of them was to be binding on both parties. The appraisers selected an umpire. The umpire and one appraiser made an award in which they determined the time required to repair the loss and damage at ninety-seven working days. Appellant set up this award in his bill of complaint as binding upon both parties. He offered in evidence the submission, the oath of the appraisers, their selection of the umpire, the oath of the umpire and the award. We are of opinion he cannot now be heard to assail their decision.

Appellee questions the allowance of rent for the stores and offices. We consider the decree sustained by undisputed proofs and also by the letter already mentioned, in which the company's adjuster also says: "At the time of my visit to your city the rental value of the stores and offices of the building at \$120 per month was verified by your leases. The question of rent on the Auditorium portion of the building remained unsettled," etc. This shows that

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he considered the rental value of the stores and offices for which appellee was liable under the policy was \$120 per month, and that he determined that from an inspection of the leases. There is no proof or presumption that appellant's tenants were liable to him for rent after the fire, and appellee's adjuster did not reach such a conclusion from his examination of the leases.

Appellee insists appellant cannot recover because he did not present proofs of loss within the time required by the policy. In our former opinion we discussed the proof on that subject very fully, and held proofs of loss had been waived. That question is not open to re-examination, as there were no further proofs on that subject at the second hearing. Appellee says appellant pleaded performance of the conditions of the policy, and not that performance had been waived, and hence cannot avail of the waiver. Waiver need not be specially pleaded, and proof thereof sustains an allegation of performance. *German Fire Ins. Co. v. Grunert*, 112 Ill., 68, 76; *Evans v. Howell*, 211 Ill., 85; *Dickson v. N. Y. Biscuit Co.*, 211 Ill., 468. Moreover appellee was bound to apprise appellant of its grounds of defense by its answer, and cannot avail itself of a matter of defense not stated in its answer. *Jewett v. Sweet*, 178 Ill., 96. The answer did not set up the failure to present proofs of loss as a defense.

Finally appellee contends that it was not liable for interest because the amount to be paid is in dispute. That interest is recoverable in a suit on a fire insurance policy, is held in *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Ill., 553; *Knickerbocker Ins. Co. v. Gould*, 80 Ill., 388, and *Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill., 322.

The decree is too indefinite in merely reforming the policy "as prayed in the bill of complaint." The details of the reformation should be so set out that the decree will itself show how the policy is to read.

The decree is reversed and the cause remanded, with di-

reactions to the court below to enter a decree in conformity with this opinion.

Reversed and remanded with directions.

Martin Beckstrom v. Joseph T. Krone.

Gen. No. 4587.

1. RECEIPT—*particular form of, construed.* An instrument as follows:

"Received from Joseph T. Krone, Eighteen Hundred Dollars, for investment in current stock of the Moline Building, Savings and Loan Association, returnable on sixty days' demand, with interest at the rate of six per cent. per annum, payable quarterly.

J. W. WARR.

"For the redemption of this deposit I hold in my hands in trust current stock of the Moline Building, Savings and Loan Association.

J. W. WARR, *Secretary.*"

construed as an acknowledgment of an indebtedness with an agreement to return the money within the time specified under the conditions recited, and not an agreement for the return of stock.

2. NEGOTIABLE—*particular instrument so held.* The instrument set forth in the preceding paragraph of this syllabus held, a negotiable instrument.

3. NEGOTIABLE—*what not essential to render instrument.* Words of negotiability are not essential to render a particular instrument negotiable.

4. TRIAL JUDGE—*duty of, where rulings upon pleadings do not conform to his views.* Where the rulings upon the pleadings have been made by a judge other than the one presiding at the trial and such rulings do not conform to the views of such trial judge, it is his duty to make the same so conform before proceeding with the trial.

5. PREPONDERANCE OF EVIDENCE—*when instruction as to, erroneous.* An instruction upon this subject is erroneous which tells the jury that if the plaintiff has proved his contract by only one witness and if the contract has been denied by one witness of equal credibility and means of knowledge, then such contract has not been proven, unless facts or circumstances have been proved corroborating the plaintiff's testimony sufficiently to outweigh the defendant's testimony.

Action of assumpsit. Appeal from the Circuit Court of Rock Island County; the Hon. EMERY C. GRAVES, Judge, presiding. Heard

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in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

A. H. KOHLER and J. T. KENWORTHY, for appellant.

J. B. OAKLEAF and SEARLE & MARSHALL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Martin Beckstrom and Joseph T. Krone made an exchange of properties of unequal value, leaving a sum due Beckstrom. Krone paid part of the difference in money, and for the remaining \$1,800 delivered to Beckstrom an instrument, the face of which is as follows:

“\$1,800. Moline, Ill., July 3, 1903.

Received from Joseph T. Krone, Eighteen Hundred Dollars for investment in current stock of the Moline Building, Savings and Loan Association, returnable on sixty days' demand, with interest at the rate of six per cent. per annum, payable quarterly.

No.....

J. W. WARR.

For the redemption of this deposit I hold in my hands in trust current stock of the Moline Building, Savings and Loan Association.

J. W. WARR,
Secretary.”

Krone made the following endorsement on the back thereof before he delivered it to Beckstrom: “Pay to the order of Martin Beckstrom. Joseph T. Krone.” The money was not paid to Beckstrom sixty days after demand, and he brought this suit against Krone. Plaintiff filed an amended declaration, containing three special counts, a common count for the balance due on the purchase price of real estate sold by plaintiff to defendant at his request, and other usual common counts. The first special count declared upon a promissory note for \$1,800 made by Warr to defendant and by the latter endorsed to plaintiff, without setting it out. The second and third special counts set out the instrument as

above copied. Defendant craved *oyer* of the instrument mentioned in the first count, and set it out as above, and demurred to the declaration and each and every count thereof. The demurrer was sustained to the special counts and overruled as to the common counts. Defendant pleaded the general issue to the common counts. Thereafter the cause was tried before another judge and a jury, and defendant had a verdict and a judgment. Plaintiff appeals.

By the instrument above set out Warr acknowledged that on its date he had received \$1,800 from defendant, and that it was to be returned sixty days after the demand therefor, and that while he retained it he was to pay interest quarterly on that amount at the rate of six per cent. per annum. The instrument cannot mean that the stock mentioned was to be returned sixty days after demand, for several reasons. We do not speak of returning that which we have not received. As Warr had not received stock from defendant he could not return stock. He had received money, and that was the only thing he could return. Again, such a construction is forbidden or at least made unreasonable by the provision for interest. Stock in a building association does not bear interest. The statement by Warr below his first signature that he holds stock "for the redemption of this deposit" shows it was the deposit of money that was to be returned. Defendant had deposited nothing but money. It is not clear from the face of the paper what is meant by the words "for investment in current stock," etc. It may mean that Warr was borrowing the money to use in making such an investment for himself. If it can be supposed to mean that Warr was to invest the money in building association stock for defendant, still it is clear that it also means that sixty days after defendant makes demand for his money that sum is to be repaid to him in money. But it cannot mean an investment in stock for defendant, for there is no provision that he shall have any profit or bear any loss. He is to be paid interest quarterly on the money at a specified and lawful rate, regardless of any profit or loss on any investment in stock, and he is to have the principal sum repaid to him in sixty days

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after he demands it. Again, if Warr was to invest the money in building association stock for defendant, he could not certify that he held that stock or any stock "for the redemption of this deposit." "This deposit" does not mean the stock, but something for which the stock is held as security.

An acknowledgment of indebtedness in the simplest form gives negotiability. *Stewart v. Smith*, 28 Ill., 397; *Dorsey v. Wolff*, 142 Ill., 589. A certificate of deposit is a promissory note. *Telford v. Patton*, 144 Ill., 611. The fact that the details of a transaction are set out in an instrument for the payment of money does not prevent its being negotiable. *Ridgley National Bank v. Patton*, 109 Ill., 179; *Industrial Bank v. Bowes*, 165 Ill., 70. A recital in an instrument, in other respects like a promissory note, that it is secured by a lien or by a deposit of collaterals, does not destroy its negotiability, unless such recital qualifies the promise or makes it uncertain or conditional. *Mumford v. Tolman*, 157 Ill., 258; *Biegler v. Merchants Trust Co.*, 164 Ill., 197; *First Nat. Bank v. Southworth*, 215 Ill., 640. Promissory notes are assignable without words of negotiability, under sections 3 and 4 of chapter 98 of the Revised Statutes, relating to negotiable instruments. *Sappington v. Pulliam*, 3 Scam., 385. Said sections 3 and 4 were not expressly repealed by the act of 1895 amending section 7 of said chapter 98, and we are not prepared to hold that said provision dispensing with the necessity for words of negotiability was repealed by implication by said amendment of section 7. The rule that negotiable paper must be payable at a time certain, is satisfied by an instrument payable on demand. 1 *Randolph on Commercial Paper*, sections 109, 117, 118. Defendant relies upon *Van Zandt v. Hopkins*, 151 Ill., 248. That case comes within the exception mentioned in the rule above stated. The payment of the instrument there in question was made conditional upon the surrender of certain shares of stock. If the stock should not be surrendered then the instrument would never become payable. Because of that uncertainty it was not a promissory note. No condition is imposed by the instrument be-

fore us. Neither defendant nor plaintiff has received any stock. The maker certifies that he holds stock to secure performance by himself. No details are given by which any holder of the paper could find or trace any particular shares of stock, but if that recital made Warr the trustee of any stock to secure that he would pay his own debt, such stock in his hands will be released from the trust whenever he pays the debt. We hold that the paper in question is a promissory note, and that the endorsement above copied transferred the title to plaintiff. It is argued that if that be true, still the averments of the special counts were insufficient. The demurrer was general, and those counts conform to the precedents in Chitty on Pleading, Vol. 2, and to our statute on negotiable instruments. We hold that the court erred in sustaining the demurrer to the special counts.

Defendant argues that such error was harmless because plaintiff could recover upon this note under the common counts. Defendant's counsel frequently objected to proof during the trial on the ground that it was not competent in the condition of the pleadings, meaning, apparently, because the demurrer had been sustained to the special counts. He did not dissent when the court, in discussing such objections, said to plaintiff's counsel: "The objection is that under the common counts you are not entitled to introduce any evidence of this note or instrument." He heard the court say that he felt bound to follow the rulings upon the pleadings made by the judge who had preceded him, though he had no doubt in his own mind that this was a promissory note. He obtained from the court the 3rd and 23rd instructions to the effect that this was not an action by endorsee against endorser, and that the endorsement did not make defendant liable, but it was merely an assignment of defendant's rights against Warr. Defendant cannot now be heard to say here on this record that plaintiff could have recovered upon the note and its endorsement under the common counts. It is true plaintiff acquiesced in this view and tried the case upon the theory that he could tender back the instrument and recover the balance due him upon the exchange of real estate;

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but he had no other alternative in view of the position of the trial judge that he must follow the rulings upon the pleadings made by the judge who preceded him. In our opinion the trial judge should have made the pleadings conform to his view of the law before proceeding with the trial, and thus have avoided the embarrassment of trying the case upon a theory he believed unsound. *Fort Dearborn Lodge v. Klein*, 115 Ill., 177; *Dowie v. Priddle*, 216 Ill., 553.

Plaintiff and defendant were the sole witnesses, except upon a formal matter. Their accounts of the terms under which plaintiff received this paper from defendant differed materially. The 15th instruction given at defendant's request said that if plaintiff had proved his alleged contract by only one witness, and if the contract had been denied by one witness of equal credibility and means of knowledge, then such contract had not been proved, unless facts or circumstances had been proved corroborating plaintiff's testimony sufficiently to outweigh defendant's testimony. The 16th instruction given at defendant's request said that if plaintiff had sworn positively that he was to have cash for the difference between the two properties, and if defendant had sworn just as positively that plaintiff was to accept paid up stock for the difference, and if the testimony of defendant is entitled to as much credit as that of plaintiff and is corroborated to the same extent, then so far as that point is concerned the jury should find for defendant. An instruction like these in principle was condemned as an invasion of the province of the jury, in *Johnson v. People*, 140 Ill., 350. As the next trial is likely to take an entirely different course, we consider it unnecessary to discuss the objections made to other instructions.

The judgment is reversed and the cause remanded for a new trial, with directions to overrule the demurrer to the special counts of the amended declaration.

Reversed and remanded.

Ira A. Newman v. V. S. Lumley, et al.

Gen. No. 4,578.

1. **REAL ESTATE COMMISSIONS**—*when may be recovered.* A real estate agent who has found a person ready, willing and able to buy the property of the owner at the price which he has agreed to accept, is entitled to his commission, notwithstanding no written contract was entered into between the owner and such agent, where the offered purchaser was desirous of taking the land and the failure to sell was because the owner would not complete the contract to which he had verbally agreed.

2. **COMMON COUNTS**—*when recovery may be had under.* When a plaintiff has completed all that he agreed to do so that he is entitled to the agreed compensation, he may recover under the common counts.

Action of assumpsit. Appeal from the Circuit Court of McHenry County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1906. Affirmed. Opinion filed March 10, 1906.

J. F. CASEY, for appellant.

C. P. BARNES, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court. Lumley, Whiteside and Murphy, real estate agents at Woodstock, brought this suit against Ira A. Newman to recover commissions which they claim defendant agreed to pay them for procuring a purchaser for a farm, of which defendant seems to have been a part owner, in McHenry county. Plaintiffs filed the common counts, and afterwards a bill of particulars under a rule obtained by defendant, and the same was afterwards amended. Defendant filed the general issue. Plaintiffs had a verdict and a judgment against defendant for \$189.59, the exact amount due them if they were entitled to recover, and defendant appeals.

Defendant, who resided in Chicago, came to Woodstock

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and placed his farm with plaintiffs for sale, gave them a price of \$55 per acre, and agreed that their commissions should be two and one half per cent. of the selling price. They afterwards brought him and Schuett, a proposed purchaser, together, and there is proof that defendant reduced the price to Schuett to \$54 per acre, and so advised plaintiffs. After various efforts plaintiffs got Howell to offer \$53 per acre. Lumley testified he communicated this offer to defendant by telephone, and that defendant refused it, but said if they could raise him half a dollar, to cinch the bargain. They then offered to give Howell fifty cents per acre out of their commissions, and he then offered \$53.50 per acre for the farm. Plaintiffs then verbally contracted to sell him the farm at that price, and Howell agreed to deposit with them on said bargain whenever they wished it a certificate of deposit he held on the bank for \$1000. Lumley testified he told defendant over the telephone that he had sold the farm, and that defendant replied he would be out with the contract and bind the bargain and forward the deed to the heirs to be signed. A few days later defendant sold the farm to another party, and when he came to Woodstock he did not visit plaintiffs, and when Lumley met him, defendant admitted he had sold the farm and said he got more out of it. Defendant admits conversations with Lumley over the telephone, but gives a quite different version of what was said, and denies that he ever authorized plaintiffs to sell at \$53.50 per acre. The main question is whether defendant did or did not authorize plaintiffs over the telephone to sell to Howell, if they could get \$53.50 per acre. If there were no proof upon that subject but the testimony of Lumley and of defendant, we would not be warranted in saying the jury should have found the other way. There may have been that in the appearance and demeanor of those witnesses while testifying which turned the scale in favor of Lumley's account. But there is other proof tending to corroborate Lumley. Murphy testified defendant told him he had offered the place to Schuett at \$54 and that if plaintiffs could get Howell close to that, to let

him, defendant, know. This tended to show an intention to let the farm go at less than \$54.

It is argued the proof does not show Howell was able to pay. He agreed to pay \$7,583.63. He testified he and his wife were worth about \$6,000, \$1,000 of which was in bank; that she was with him in the transaction; that he knew where he could make arrangements for the balance of the money; and that he expected to be prepared to pay plaintiffs the cash when the time came. There was other proof his financial condition was good. It is obvious he could borrow at least \$3,000 on the farm itself,—indeed there was then a mortgage upon the farm. He could either assume it or put another in its place. Howell soon after bought another farm at \$76 per acre. Defendant introduced no proof questioning Howell's ability to pay for the place. The conclusion of the jury on that subject was warranted by the proof.

It is argued plaintiffs could not recover under the common counts. They had found a person ready, willing and able to buy at a price which the jury have found defendant agreed to accept. It was not necessary as between seller and agent that the contract should be in writing, where as here the purchaser was desirous of taking the land, and the failure to sell was because the owner would not complete the contract to which he had verbally agreed. *Fox v. Starr*, 106 Ill. App., 273. When a plaintiff has completed all he agreed to do, so that he is entitled to the agreed compensation, he may recover under the common counts. *Sands v. Potter*, 165 Ill., 397, 407. Such commissions were recovered under the common counts in *Henry v. Stewart*, 85 Ill., App., 170, and 185 Ill., 448; *Parmly v. Farrar*, 204 Ill., 38, and *Springer v. Orr*, 82 Ill. App., 558.

We have examined the objections made to the rulings of the court upon the instructions, and find they were not erroneous.

The judgment is affirmed.

Affirmed.

John T. Wilson v. Osman J. Wilson.**Gen. No. 4,593.**

1. **PRACTICE ACT—section 23 construed.** This section does not give to a defendant an absolute right to interpose further defenses after he has once pleaded.

2. **AMENDMENT—when motion for leave to make, properly denied.** Where a cause for several years has stood at issue, a motion, unaccompanied by a showing as provided by rule of court, to file a plea of the Statute of Limitations after the same has been set for trial, is properly denied.

3. **NON-JOINDER—how advantage of, must be taken.** The non-joinder of a necessary defendant can only be taken advantage of by a plea in abatement unless such non-joinder appears from the plaintiff's own pleading, and the rule is the same notwithstanding joint liability is not claimed to apply to all of the items of the plaintiff's demand.

4. **SET-OFF—when plea of, essential.** A defendant to avail himself of independent items against the plaintiff not arising out of the subject-matter for which the plaintiff sues, must interpose a plea of set-off.

5. **SERVICES—when question as to reasonable value of, immaterial.** The question as to the reasonable value of the services for which suit is brought is immaterial where there appears to have been an express contract fixing the value of such services.

Action of assumpsit. Appeal from the Circuit Court of LaSalle County; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1905. Affirmed. Opinion filed March 10, 1906.

L. W. BREWER, for appellant.

GEORGE S. WILEY and BROWNE & WILEY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Appellee recovered a verdict and a judgment in the court below against appellant, his brother, for \$700 for services rendered to appellant in his electric light plant at Earlville. The pleadings were the common counts and the general is-

sue. Under a rule obtained by appellant, appellee filed a bill of particulars, charging for services from December 8, 1896, to November 3, 1897, and from February 12, 1898, to August 12, 1901; but the proofs practically divided the services into three periods. The first period was from December 8, 1896, to November 3, 1897, for which appellee sought to recover what his services were reasonably worth, and offered proof that they were worth \$1 per day. The second was from February 12, 1898, to February 6, 1900, at the agreed rate of \$1 per day. The third was from February 6, 1900, to August 12, 1901, for which appellee sought to recover what the services were reasonably worth and introduced proof that they were worth \$50 per month. As to the first period of service, appellee's proof was as follows: Appellant proposed to appellee to go to work firing in the electric plant and to learn the business; that appellant would buy books and magazines so that he might read up on that work, and that he would direct Saddler, the engineer and electrician in charge of the plant, to instruct appellee in the work. Appellee, who was about 35 years of age and married, replied that he would like it, but he had to live. Appellant said: "I will see that you live." They agreed the wages at the start should be nothing. Appellee went to work for appellant under that arrangement, but Saddler refused to teach him. Appellee then told appellant of that refusal, and that under these circumstances he could not stay upon the terms under which he had gone to work. Appellant told him to stay, and he would make it all right with him, and he did stay and work. He gave a detailed account of the different services he regularly performed in connection with the plant. If there was such a second arrangement made, it entitled appellee to receive what his services were reasonably worth. Appellant testified that the first contract was that appellee should work a year for him for nothing while learning the business, and that after the first year he was to have \$1 per day, and that when he was able to run the plant appellant would raise his wages and put him in charge of the plant and let Saddler go.

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Appellant denied that appellee told him Saddler would not instruct him and that they then made a different arrangement. They both testified appellee quit the work November 3, 1897; that he went to work again for appellant on February 12, 1898, at the agreed wages of \$1 per day and so continued till February 6, 1900, when Saddler left. That was the second period. As to the third period appellee testified that when Saddler left appellant asked appellee if he thought he could run the plant; that he replied that he knew he could; that appellant said if he could he would give him as much as any other man; that he immediately took charge, and operated the plant till August 13, 1901, when he quit. He introduced proof that his services during that period were worth \$50 per month. Appellant testified that the contract then made was that he would raise his wages \$5 per month each year till he got the same wages Saddler had received, provided he proved competent to take charge of the plant. Appellant introduced proof that appellee was not competent to run the plant, and did not run it alone, and that his services during the third period were worth \$30 to \$35 per month. In this conflict of testimony the jury decided for appellee and the trial judge approved their verdict. This was purely a matter of fact, and we cannot say they should have found the other way.

Appellant contends that the court erred in refusing him leave to file a plea of the Statute of Limitations. The summons was served and declaration filed January 5, 1903. On January 22, 1903, appellee filed his specific bill of particulars in compliance with the rule obtained by appellant. Appellant filed the general issue the next day. On February 23, 1905, the cause was set to be tried on March 6th. On March 3rd, appellant served notice on appellee that on March 6th he would ask leave to file two additional pleas. On March 6th appellant presented and asked leave to file a plea of the Statute of Limitations. There was then in force the following rule of court: "No cause shall be set for a particular day till at issue, and no change in pleadings will be allowed after a cause is set, unless good cause is shown

by affidavit." No cause was shown. The court denied the motion and entered upon the trial. Section 23 of the Practice Act allows amendments in any pleading at any time before judgment on such terms as shall be just and reasonable, and this provision has been liberally construed, but it does not give a defendant an absolute right to interpose further defenses after he has once pleaded, nor does it compel the court to grant leave to file new pleas upon a mere motion. Where a defendant asks leave to file a further plea setting up an entirely new defense, especially if a long time has passed since his original plea was filed and the case is about to be reached for trial, he must support his application by showing diligence and some reasonable excuse for not having sooner presented his defense. *Dow v. Blake*, 148 Ill., 76; *Phenix Ins. Co. v. Stocks*, 149 Ill., 319; *Dulle v. Lally*, 167 Ill., 485; *Phenix Ins. Co. v. Caldwell*, 187 Ill., 73; *City of Chicago v. Cook*, 204 Ill., 373. There is nothing to show that appellant could not have filed this plea with the general issue over twenty-five months before. The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and to restrict the plaintiff, on the trial, to proof of the particular matters therein stated. *McDonald v. People*, 126 Ill., 150; *Waidner v. Pauly*, 141 Ill., 442. The specific bill of particulars here filed furnished appellant full information as to the periods of time during which appellee claimed he rendered the service for which he sought compensation in this suit. To grant such an application to file an additional plea at the time fixed for trial is either to compel the plaintiff to go to trial at a disadvantage and without the previous information as to the defenses to be interposed and preparation therefor to which he is fairly entitled, or else to force him to a continuance when he is ready for trial on all issues previously presented. This should not be permitted unless a good reason for the delay is shown. No error was committed in refusing leave to file this plea.

The court refused to permit appellant to prove that during part of said first period of service Frank A. Wiley and

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appellant jointly owned and operated the plant. The rule at common law is that if a person be omitted as defendant who ought to be joined in an action on a contract, advantage of the omission can only be taken by a plea in abatement, unless the joint liability appears from plaintiff's own pleading. 1 Chitty's Pl., 46; 1 Saunder's Pl. & Ev., 10; Rev. Stat. chap. 1, sec. 4; Conley v. Good, Breese, 135; Lurton v. Gilliam, 1 Scam., 577; Puschel v. Hoover, 16 Ill., 340; Thompson v. Strain, 16 Ill., 369; Pearce v. Pearce, 67 Ill., 207; Ross v. Allen, 67 Ill., 317; Sinsheimer v. William Skinner Mfg. Co., 165 Ill., 116. Proof that another is liable with defendant does not tend to show that defendant is not liable, and hence does not tend to establish the general issue. The fact that the joint liability is not claimed to cover all the items of plaintiff's demand, does not abrogate the rule requiring that defense to be set up by a preliminary plea which gives the plaintiff a better writ, if he choose to avail of it. As defendant did not plead this defense in abatement, this proof was properly rejected.

Appellant sought to prove debts which appellee owed him prior to making this first contract for employment, and which therefore could not have been intended as payment for the services here sued for. A defendant cannot avail of independent demands he has against the plaintiff, not arising out of the subject-matter for which plaintiff sues, unless he has filed a plea of set-off or given notice thereof under the general issue or under a plea of payment. Rev. Stat., chap. 110, sec. 29; Cox v. Jordan, 86 Ill., 560. Appellant had not filed such a plea or given such notice, and this proof was therefore properly rejected. Appellee in his bill of particulars gave appellant credits for cash and other matters amounting to a large sum. The court also ruled generally that appellant might show any money or property that had been paid or given or turned over by appellant to appellee after appellee began working for appellant. It is argued the court violated this ruling as to one item of proof. Appellant kept a meat market during the early part of appellee's employment, and proved by Herman Kline, an em-

ploye in the market, that there was a charge for meat against appellee on the account book kept in the market. Appellant asked Kline to read the items to the jury. Various objections were made by appellee, including the objection that no foundation had been laid. No effort was made to show that the entries in the book were true and correct, nor that the witness remembered this particular transaction, nor that the date of the entry was during the time appellee was in the employ of appellant; and the entries themselves were not offered so that they could be inspected by opposite counsel. The court did not err in refusing to permit the witness to read to the jury from the book items which had not been admitted or even offered in evidence, nor shown to be competent.

Appellant claims that the court erred in refusing to permit him to prove by the witness William Gibbler the value of appellee's services from February 13, 1898, to February 6, 1900. This was the period during which he was working under an express contract that he should receive \$1 per day, as both parties testified. As there was an express contract, the reasonable value of the services was immaterial. The court sustained the objection for that reason. John Harkness had testified for plaintiff before the terms of the employment had been shown, and he seems to have been examined as to the value of appellee's services during the same period, and fixed it at \$1.50 per day. The court was not then advised that it would be shown that that period was covered by a special contract fixing the wages. When that fact did appear no motion was made to exclude the answer of Harkness. Appellee ought not to have asked that question, in view of the proof he was to introduce, but it cannot be said the court erred in allowing Harkness to make that answer, as the case then stood; and that answer furnished no ground for admitting other incompetent evidence on the same subject after its incompetency became apparent. The twelfth instruction, given at appellant's request, practically told the jury to allow appellee but \$1 per day for the period covered by that special contract, and we conclude ap-

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pellant could not have been harmed by the evidence of Harkness.

Appellee's instruction number one was held correct under a like condition of the pleadings in *Pearce v. Pearce*, *supra*, and number two was of like tenor. Number three did not submit the construction of a contract to the jury. Numbers fifteen and sixteen, requested by appellant and refused, practically directed a verdict for appellant as to the first period of service, ignoring the proof that Saddler refused to instruct appellee and that that led to a new agreement by which appellee was to stay and work and appellant was to make it all right. Number seventeen was incorrect because no plea in abatement had been filed. Number eighteen was incorrect because it directed a verdict for appellant if appellee's services were worth no more than he had already been paid therefor, which was not the rule applicable to the second period of service when there was an agreement to pay a fixed sum per day. The court did not err in refusing said instructions.

We find no reversible error in the record. The judgment is affirmed.

Affirmed.

F. H. Earl Manufacturing Company v. Summit Lumber Company.

Gen. No. 4,563.

1. **DEMURRER**—*exception not essential to preserve ruling upon.* No exception or bill of exceptions is required to preserve for review a ruling upon a demurrer to a pleading in a common law action.

2. **PLEA**—*when proof of, not essential.* Where a demurrer to a plea has been sustained, no proof need be offered to sustain its allegations, nor is such proof essential to a determination of its sufficiency on appeal.

3. **PLEA**—*when sufficiently alleges that foreign corporation was doing business in Illinois contrary to statute.* Such a pleading if framed in the language of the statute is sufficient; it need not describe in detail what business such a corporation was doing.

4. PLEA—*what does not waive action of court in sustaining demurrer to.* The action of the court in sustaining a demurrer to a plea setting up the incapacity of the plaintiff to sue, is not waived by subsequently pleading the general issue.

5. PLEA IN ABATEMENT—*when defendant concluded by, when not.* If a demurrer to a plea in abatement is sustained the judgment is only *respondeat ouster*, while if issues of fact are joined on such a plea and found for the plaintiff, the judgment is *quod recuperet*, and the same jury should assess the damages.

6. CONSIGNEE—*when title passes to.* Delivery to a carrier of merchandise properly consigned, is delivery to the consignee, and title passes to the consignee.

7. CONSIGNEE—*what not defense by, to suit for purchase price.* Refusal of the consignee to accept merchandise properly consigned and delivered to a carrier, will not defeat an action for the purchase price.

Action of assumpsit. Error to the Circuit Court of Kendall County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

ALDRICH & WORCESTER, for plaintiff in error.

JOHN FITZGERALD, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

The Summit Lumber Company, an Arkansas corporation, with its lumber mills in Louisiana and its sales office in St. Louis, sued the F. H. Earl Manufacturing Company, doing business at Plano, Illinois, upon a lumber bill claimed to be due from defendant to plaintiff. Defendant filed a plea in abatement alleging that plaintiff was a foreign corporation doing business in this State, and that it had not complied with any of the provisions of our statute concerning foreign corporations doing business in this State, specifying such non-compliance in detail, and that therefore, by the provisions of said statute, plaintiff was not permitted to maintain an action in the courts of this State. The court sustained a demurrer to that plea, and defendant then pleaded the general issue. There was a jury trial and a verdict for plaintiff for \$623.75. Motions by defendant for a new trial

and in arrest of judgment were made and denied, and plaintiff had judgment. Defendant has sued out this writ of error to review said judgment.

It is argued that the ruling upon the demurrer is not before us, for want of an exception thereto. No exception or bill of exceptions is required to preserve for review a ruling upon a demurrer to a pleading in a common law action. *Bennett v. Union Central Life Ins. Co.*, 203 Ill., 439; *Burke v. C. & N. W. Ry. Co.*, 108 Ill. App., 565. It is said the proof does not show plaintiff was doing business in this State within the meaning of said statute. As no issue of fact was formed on that plea, defendant was not required to offer such proof. The sufficiency of a pleading when questioned by demurrer does not depend upon proof heard at a trial of the cause. It is argued the plea should have described in detail the business plaintiff was doing in this State, and reliance is had upon language used by this court in *Havens & Geddes Co. v. Diamond*, 93 Ill. App., 557. There an issue of fact had been raised and tried upon the question whether plaintiff, a non-resident corporation, was doing business in this State, within the meaning of our statute. We did not there discuss what averments such a plea should contain. The plea now before us is drawn in the language of the statute, and therefore we think it must be held sufficient in form. If the plea was true plaintiff could not maintain this action in the State court. *Thompson Co. v. Whithed*, 185 Ill., 454; *Ill. Trust Co. v. St. L. I. M. & S. Ry. Co.*, 208 Ill., 419. The court erred in sustaining the demurrer to the plea. Defendant did not waive this error by afterwards pleading the general issue. *Delahay v. Clement*, 3 Scam., 201; *Weld v. Hubbard*, 11 Ill., 573; *Drake v. Drake*, 83 Ill., 526. If a demurrer to a plea in abatement is sustained, the judgment is only *respondeat ouster*, while if issues of fact are joined on such a plea and found for plaintiff, the judgment is *quod recuperet*, and the same jury should assess the damages. 1 Chitty's Pl., 463; *Bradshaw v. Hubbard*, 1 Gilm., 395; *Branigan v. Rose*, 3 Gilm.,

123; Mineral Point R. R. Co. v. Keep, 22 Ill., 9, 19; Italian-Swiss Colony v. Pease, 194 Ill., 98.

Defendant ordered of plaintiff five cars of a special kind of lumber known as "short stock," received and paid for one car, and refused to receive the remaining four cars when shipped to it. This suit is to recover the price of said four cars. Defendant claims it lawfully cancelled the order before said four cars were shipped, and therefore was not bound to receive or pay for them. The proof in the record is that Kline, an agent of defendant, gave plaintiff a verbal order for the five cars at plaintiff's St. Louis office on or about February 20, 1902, in which it was provided that one car should be shipped at once, and no statement was made when the other cars should be shipped. The law therefore implied a contract to ship them within a reasonable time. Plaintiff then sent an order to its mill in Louisiana to ship one car at once, and one car per month thereafter till the order was filled. The first car was shipped on February 26th, and it was received and paid for by defendant. Under date of March 1st, defendant, from its office in Plano, sent plaintiff a written, or partly written and partly printed, order for the five cars, which stated that it was in confirmation of the order given by Kline. That order contained the following, which we judge was in print: "This order is not valid unless countersigned by president or secretary. This order, unless otherwise specified, is to be shipped at once; if unable to do so notify us by return mail stating when will ship." This order or letter was not countersigned by either president or secretary, and strictly speaking therefore was by its own terms prevented from having any effect whatever. Again, the words "unless otherwise specified," might well have appeared to plaintiff unimportant, for it is obvious that Kline's order not only meant that one car should be shipped at once, but also that the rest should not be shipped at once. That point had really been "otherwise specified" by the form of the verbal order. It does not appear that plaintiff replied to this letter or written order. Under these proofs the contract was that made verbally at St. Louis. Af-

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ter that verbal order had been accepted, and the contract thereby closed, and it had been partly executed by the shipment of one car, defendant could not by its own act alone change this into a contract to deliver five cars at once. Defendant did not request further shipments or complain of delay until May 1st. Then defendant wrote plaintiff that it had heard nothing from the order for sixty days, and presumed plaintiff was not going to ship it, and added: "So we will ask you to cancel the order, so that we may know just exactly where the matter stands." In a postscript it said: "If this is not satisfactory, let us know." We are of opinion that under the facts stated defendant could not cancel the order without any previous notice or request for shipment; and also that this letter was not intended as a final cancellation. It requested a cancellation, but recognized that plaintiff had a right to refuse to cancel. The reply by plaintiff is twice in evidence, under different dates, owing to some mistake in the bill of exceptions, but it is obvious that the true date is May 2nd. Plaintiff replied that it would not be at all satisfactory to cancel the order as it had the stock all ready to load, but had found it impossible to get cars and that it was daily expecting invoices for one or two cars. Plaintiff shipped two cars on May 10th, one car on May 15th, and the last car on May 16th. On May 15th defendant wrote plaintiff, declaring it had cancelled the order, stating it had that day received invoices for two more cars, and adding, "We will take this lumber in, but we don't want you to ship any more, for, not getting the lumber when we should have received it, we ordered very heavily of other people, so can't use more for some little time." We conclude the proofs do not show a valid cancellation of the order. It is not questioned but that the lumber was of the kind and quality ordered, and no sufficient reason appears why defendant should not have received and paid for it.

When this lumber was delivered on board cars at the point of shipment, consigned to defendant, it was thereby delivered to the defendant, and the title vested in the defendant. *City of Carthage v. Duvall*, 202 Ill., 234; *L. S. & M.*

S. Ry. Co. v. National Live Stock Bank, 178 Ill., 506. It was therefore the duty of defendant to take care of the shipments when they reached Plano, and plaintiff's cause of action for the agreed price would be unaffected by any failure of defendant to take care of the lumber at that point. Defendant sought to prove a subsequent arrangement with plaintiff, by which the care of the lumber at Plano, and a duty to account for its proceeds, was cast upon plaintiff. J. E. Silverthorne, secretary and manager of plaintiff, was a witness for plaintiff. On cross-examination he testified he had five brothers; that two of them were connected with plaintiff, and that they had never been at Plano, but that another brother, not directly connected with plaintiff, had been at Plano. An officer of defendant testified that a Mr. Silverthorne, whose initials he did not remember, but not J. E. Silverthorne, came to Plano with the invoices of this lumber, sought a settlement with defendant, and offered either to accept a reduced price defendant offered for the lumber or else to take care of the lumber. He went away and did not further communicate with defendant. There was no proof that this Mr. Silverthorne was in the employ of plaintiff, or had authority from plaintiff to make a settlement; and if he had been the agent of plaintiff with due authority, still he made no contract. This proof did not cast upon plaintiff the duty of caring for defendant's lumber at Plano. The jury allowed \$88.52 less than was due to plaintiff, and defendant has no cause to complain thereof.

But if the plea in abatement is true plaintiff has no right to a judgment for its claim in the courts of this State. For the error in sustaining the demurrer to the plea in abatement the judgment is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Samuel Morganstein v. Commercial National Bank of Chatsworth.**Gen. No. 4571.**

1. **BANKRUPT**—*what property in possession of, unaffected by bankruptcy proceedings.* Where property in question in a replevin suit was set off to a bankrupt as exempt, the title thereto did not pass to the trustee in bankruptcy and the same remained unaffected by such bankruptcy proceedings.

2. **DISCHARGE IN BANKRUPTCY**—*what not affected by.* A discharge in bankruptcy will not preclude a creditor who has filed his claim in the bankruptcy proceeding from enforcing against the bankrupt security held by him against property which remained unaffected by the bankruptcy proceedings.

3. **PLEDGE**—*what not covered by terms of.* A set of scales and a quantity of rock salt is not covered by a pledge of "iron, junk, hides, etc.," the "etc." being held only to refer to property of the same general character as "iron, junk and hides."

4. **PLEDGE**—*may cover after-acquired property.* A party can create a lien on after-acquired property.

5. **PLEDGE**—*character of lien of, upon after-acquired property.* A pledge of after-acquired property confers an equitable lien.

6. **REPLEVIN**—*when does not lie.* Replevin does not lie to enforce a lien given upon property acquired after its creation by instrument of pledge.

7. **MOTION FOR NEW TRIAL**—*when not necessary to preserve questions for review.* A motion for a new trial is not necessary to preserve questions for review where the case was tried by the judge without a jury.

Action of replevin. Appeal from the Circuit Court of Livingston County; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

JAMES T. TERRY, for appellant.

A. C. NORTON and R. B. CAMPBELL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On February 19, 1904, the Commercial National Bank of Chatsworth brought its action of replevin against Samuel Morganstein, for a set of scales, and for certain specified quantities of rock salt, green hides, bones, and assorted old iron. The declaration was in replevin, with a count in trover. The defendant pleaded *non cepit, non detinet*, property in himself and not in plaintiff, and to the count in trover, not guilty. The cause was tried without a jury. Propositions of law were presented and acted upon. The court found plaintiff the owner of the property replevied and entitled to the possession, and gave judgment that the plaintiff have and retain said property. Defendant appeals.

The facts are practically undisputed. On October 23, 1900, defendant, being indebted to plaintiff, executed and delivered to it a paper, the body of which was as follows:

"For and in consideration of money already advanced by the Commercial National Bank of Chatsworth, Ill., the receipt whereof is hereby acknowledged, and for all further advances of money hereafter made for the purchase of iron, junk, hides, etc., the said S. Morganstein hereby agrees that all iron, junk, hides, etc., now in his yard at Chatsworth, Illinois, or held elsewhere or in transit to Chatsworth, Illinois, or in transit to points and destination in shipping same, together with all hides, iron, junk, etc., that may hereafter be purchased by S. Morganstein and held or handled as above described, is and shall be and remain the property of the Commercial National Bank of Chatsworth, Illinois, with the right and power to sell and control same, and to collect all moneys from such sales, the returns of all sales to be made to Commercial National Bank of Chatsworth, Illinois, and after deducting all moneys advanced, and interest and charges on same, the remainder, if any, to be turned over to S. Morganstein."

Said paper was not acknowledged or recorded. The set of scales here replevied was in defendant's possession when said paper was delivered. All the property then owned by defendant coming within the description "hides, iron, junk," which defendant had when he gave this paper, was sold and

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disposed of, and his junk yard cleaned out, prior to or during 1902. Except the scales all the property replevied was acquired by defendant after this paper was made and delivered. On the faith of this paper, plaintiff advanced moneys to defendant far in excess of the value of the property, and afterwards obtained a judgment against defendant for over \$5,000 upon said indebtedness, and had execution. After that, on November 24, 1903, defendant filed a petition in bankruptcy and was declared a bankrupt. The property in controversy was selected and set-off to him as exempt in said bankruptcy proceedings. Plaintiff's judgment was proved and allowed as a claim against said bankrupt estate. The property of the bankrupt did not pay to exceed fifty cents on the dollar of his indebtedness. The bankrupt was discharged since this suit was begun. Before this suit was begun, plaintiff demanded and defendant refused possession of this property.

We are of opinion that the court below correctly held that the bankruptcy proceedings did not affect the questions here involved. As this property was set-off to the bankrupt as exempt under the laws of Illinois, title thereto did not pass to the trustees in bankruptcy, and it is unaffected by those proceedings. If plaintiff proved its claim in bankruptcy for its entire demand, instead of for the unsecured portion thereof, that is a matter only affecting the other creditors, and in which the debtor is not concerned here. While the discharge in bankruptcy relieved defendant of a personal liability to plaintiff for the debt, it did not prevent plaintiff from enforcing any security it held against the property of defendant.

This instrument was in the nature of a pledge of the property therein named as security for a debt. It was valid between the parties. The set of scales is the only article involved in this suit that was owned by defendant when the instrument was executed. That instrument conveys only "iron, junk, hides, etc." The "etc." must be held only to refer to property of the same general character as iron, junk and hides. There is nothing in this proof to show that a

set of scales would be embraced within those terms. Very likely it was useful in weighing the iron and other articles, but so a horse and wagon might have been useful in transporting the same, and yet, if they happened to be kept in the same yard, we do not suppose it would be claimed that they would pass by this instrument. The suit and recovery includes four tons of rock salt, and there is nothing in this record to show that it was included in the terms of this pledge. The rest of the property is fairly included in the pledge, but was acquired long after the instrument was executed. A party can create a lien on after acquired property in this State. *Gregg v. Sanford*, 24 Ill., 17. But it seems to be the law in this State that as to such after acquired property, the mortgagee or pledgee does not take a title which he can assert in an action at law against the mortgagor for the possession of the property, as he could do if the property had been in existence when the mortgage was given. What the mortgagee acquires by such mortgage of after acquired property is an equitable lien or charge upon the property. *Gregg v. Sanford*, *supra*; *Borden v. Croak*, 131 Ill., 68; *Pingrey on Chattel Mortgages*, sec. 248; *Tennis v. Midkiff*, 55 Ill. App., 642. Having only an equitable charge upon the property, plaintiff could not maintain replevin for the future acquired property, and was not entitled to a judgment that it was the owner thereof.

Plaintiff urges that these questions could not be raised without a motion for a new trial. No motion for a new trial is necessary in a case tried without a jury, and the legal propositions here involved were fully covered on both sides by propositions of law presented by the plaintiff and held by the court, and propositions of law presented by the defendant and refused by the court; to all of which action defendant excepted, as well as to the finding and judgment of the court, and preserved said exceptions in his bill of exceptions. The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

**Sturges, Cornish & Burn Company v. Judson H.
Cornish.**

Gen. No. 4,566.

1. **ASSIGNMENT OF ERRORS**—*when deemed waived.* Errors not argued are deemed waived.

2. **LEVY**—*when action of court in releasing, will not be reviewed.* In an attachment proceeding the action of the court in releasing a levy is not subject to review until final judgment has been rendered and entered in such proceeding.

Action of assumpsit. Error to the Circuit Court of Rock Island County; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the October term, 1905. Writ dismissed. Opinion filed March 10, 1906.

BULKLEY, GRAY & MORE and ROBERT R. REYNOLDS, for plaintiff in error.

JOHN C. BURCHARD, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

Sturges, Cornish & Burn Company, a corporation, brought suit in assumpsit in the court below against Judson H. Cornish and also sued out an attachment and caused it to be served on the Fremont Butter Tub Company, a corporation, as garnishee, and caused said writ to be levied upon 100 shares of the stock of the last named company as the property of defendant. Defendant moved to quash said levy, and plaintiff moved to strike that motion from the files. These motions were heard. Plaintiff's motion was denied and defendant's motion was granted, and the levy of the attachment upon the capital stock was quashed. Plaintiff took a bill of exceptions containing the proof upon said motions. The garnishee answered interrogatories, and defendant afterwards traversed the affidavit for an attachment and filed a plea in bar. There was a jury trial and a verdict for plaintiff on both issues, the damages being assessed. Defendant

moved for a new trial. It was denied as to the issues in bar, and plaintiff had judgment for its damages. The court granted a new trial of the issues in attachment, and that is still pending in the court below. Plaintiff sued out this writ of error. Two of its assignments of error question the judgment for the damages, but they are not argued, and the proof heard upon the trial before the jury is not in this record. Those assignments of error are waived. The other assignments question the action of the court in releasing the levy upon the stock, and in not refusing to entertain that motion..

There is no final judgment upon the issues in attachment. That matter is still pending in the court below. If when they are tried again the verdict and judgment shall be against plaintiff, then the release of the levy upon the stock will not harm plaintiff. The attachment suit cannot be brought here by piecemeal. There must be a final judgment upon the issues in attachment before the interlocutory questions here discussed can be presented to this court for decision. The writ of error is therefore dismissed, with leave to the parties to withdraw the several papers filed by them, if they shall be so advised.

Writ of error dismissed.

Ida Gersman v. Bert L. Cooper, et al.

Gen. No. 4,567.

1. *APPEAL*—to what court taken from order appointing conservator. An appeal from an order entered by a county court appointing a conservator should be taken to the circuit and not to the appellate court.

2. *WRIT OF ERROR*—when does not lie from appellate to county court. A writ of error does not lie from the appellate to the county court for the purpose of reviewing an order of the latter court appointing a conservator, notwithstanding the jurisdiction of such county court to appoint such conservator is sought to be questioned and an appeal taken therefrom would admit such jurisdiction.

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Proceeding for appointment of conservator. Error to the County Court of Kankakee County; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1905. Writ dismissed. Opinion filed March 10, 1906.

D. R. ANDERSON, for plaintiff in error.

BERT L. COOPER, for defendants in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

By proceedings in the County Court of Kankakee county in November and December, 1903, Mrs. Ida Gersman was found incapable of taking care of her property, and a conservator of her estate was appointed and qualified. She has sued out a writ of error from this court and seeks to reverse said proceedings because of an alleged defect in the summons which was served upon her, and because of an alleged defect in the service of said summons, and because of an alleged defect in the return upon said summons, because of which defects she claims it appears of record that the County Court failed to acquire jurisdiction to enter said orders. A motion by defendants in error to dismiss the writ of error for want of jurisdiction was taken with the case.

This proceeding in the County Court was under chapter 86 of the Revised Statutes, which was adopted in 1874. Section 40 thereof provides for appeals to the Circuit Court from all orders and judgments rendered under that act. Section 8 of the Appellate Court Act, as amended in 1887, gives the appellate courts jurisdiction of all appeals and writs of error from the final judgments, orders and decrees of county courts, "in any suit or proceeding at law or in chancery, other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute." The Appellate Court Act, being the later, impliedly repealed the former, if they are in conflict. Is this a suit or proceeding either at law or in chancery? Those words in the Appellate Court Act have been construed to mean "a suit or proceeding instituted or carried on in substantial conformity with the forms and modes prescribed by

the common law." *Grier v. Cable*, 159 Ill., 29. We regard this as not such a suit or proceeding, but as a special statutory proceeding whereby county courts, acting in a summary manner and without pleadings or the forms of the common law may, through a conservator, take charge of and preserve the estates of those who are found to be mentally incapable of caring for their own property. It follows that, notwithstanding section 8 of the Appellate Court Act, appeals from judgments and orders entered under said chapter 86 must go to the Circuit Court as provided in section 40 of said chapter 86. Therefore if Mrs. Gersman had appealed from the orders of which she now complains, that appeal must have been to the Circuit Court. A writ of error will not lie from the Supreme or Appellate Court to bring in review a judgment or order of a lower court where the statute provides for an appeal from such judgment or order of such lower court to the Circuit Court. *Hobson v. Paine*, 40 Ill., 25; *Frans v. People*, 59 Ill., 427; *Kingsbury v. Sperry*, 119 Ill., 279; *Dawson v. Eustice*, 148 Ill., 346. Where, in a special statutory proceeding, one form of review is specifically given all other forms of review are excluded. *Allerton v. Hopkins*, 160 Ill., 448. Section 19 of Article 6 of the Constitution does not give an absolute right to a writ of error from the final determinations of county courts. That is only a direction to the General Assembly. *Kingsbury v. Sperry*, *supra*. Mrs. Gersman's counsel argues that she ought to have a writ of error because by an appeal she would have admitted the jurisdiction of the County Court, whereas she desires to deny that jurisdiction. That is only an argument for some further statute on the subject. A defendant in a suit before a justice of the peace may wish to deny that that officer obtained jurisdiction to render a judgment against him; yet the only direct remedy the statute affords him is by an appeal to the Circuit or County Court, which appeal will confer jurisdiction. Our conclusion is that, as the act under which a conservator was appointed for Mrs. Gersman's estate gave her a right of appeal from that order to the Circuit Court, this court has no jurisdiction

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to review that order by writ of error to the County Court.

In *Haines v. Cearlock*, 184 Ill., 96, the Supreme Court took jurisdiction of a writ of error in a somewhat similar case (though under chapter 85 and not chapter 86), so far as to determine that the record presented no constitutional question for its decision. But it is to be noticed, first, that the provision of said chapter 85 for an appeal to the Circuit Court was not there presented for consideration; and, second, that the person for whose estate a conservator had been appointed was not summoned or notified, and no trial or inquest was had, and hence she had had no opportunity to appeal. Thereafter the Appellate Court took jurisdiction of a writ of error in that case and reversed the order. *Haines v. Cearlock*, 95 Ill. App., 203. The conclusion of that court that it had jurisdiction was in part based upon the lack of summons, notice and trial. In the case before us Mrs. Gersman was actually summoned (though she asserts there were technical defects in the summons, service and return), and the record shows that she appeared and participated in the trial before the jury, and therefore had the fullest opportunity to appeal to the Circuit Court if she had desired. Indeed, as there is no bill of exceptions in the record giving a history of what occurred at the trial at which she was present and in which she took part, we have no means of knowing but she was at that time entirely satisfied with the result and perhaps even desirous that a conservator should be appointed. If she now considers herself capable of managing her own estate, said chapter 86 contains ample provisions for her restoration to the control of her property.

The writ of error is dismissed.

Writ of error dismissed.

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Brice Lane, et al. v. Yeomen of America.

Gen. No. 4598.

1. **PEREMPTORY INSTRUCTION**—*effect of motion for.* A motion for a peremptory instruction admits the truth of all opposing evidence and of all inferences which may fairly and rationally be drawn therefrom. If there is evidence which fairly tends to establish the plaintiff's case, the court is not at liberty to weigh the evidence under such a motion and to determine where the preponderance lies, but that question must be submitted to the jury.

2. **BENEFIT CERTIFICATE**—*what essential to enforcement of forfeiture of.* Unless the circumstances show a clear intention to declare a forfeiture it will not be enforced.

3. **BENEFIT CERTIFICATE**—*when forfeiture of, will not be enforced.* Where a course of dealing of the company with the insured has been such as to induce a belief that the provision for a forfeiture will not be insisted upon, the company will not be allowed to set up such forfeiture against one in whom its conduct has induced such belief. Conduct on the part of an insurance company or a beneficiary society which amounts to a recognition of the member's continuing membership after he has made default authorizing his suspension, will waive the default.

Action of assumpsit. Appeal from the Circuit Court of Winnebago County; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

FISHER & NORTH, for appellants.

FRANK G. PLAIN and R. K. WELSH, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The Yeomen of America is a fraternal beneficiary society having its head offices at Aurora. In the autumn of 1902, a local council of that order was organized at Rockford. James B. Lane of Rockford joined that council, and assisted H. A. Cross, the deputy organizer, in its organization. Lane then removed to Springfield, Missouri. His certificate is not dated, but it seems to have been delivered to him Oc-

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tober 11th without being countersigned by the local officers, because they had not yet been elected. After he reached Missouri he returned the certificate to the society for such countersignatures, which were afterwards added. He was taken very ill with typhoid fever early in March, 1903, was removed to a hospital on March 12th or 13th and was semi-unconscious or delirious most of the time thereafter till his death on April 11, 1903, of typhoid-pneumonia. Requests by a member of his family to the society for blanks for proofs of death resulted in a reply from the supreme secretary that Lane stood suspended on April 1st for the nonpayment of his March dues. The heirs at law brought this suit to recover the benefits named in the certificate and therein made payable to his legal heirs. The declaration was in the usual form upon the certificate. Defendant filed the general issue and a special plea. The special plea set out various provisions of the application and of the laws of the order. In the application Lane agreed to make prompt payment of all sums of money when they became due, and to conform in all respects to the laws of the order, and that if he should be suspended for any violation of any law of the order or for the nonpayment of dues or monthly payments, then all rights which he and his beneficiaries and heirs might have upon the benefit fund should be forfeited. A law of the order provided that one monthly payment should be due from each beneficial member on the first day of each month, without notice, and that it must be paid to the subordinate secretary on or before the last day of each month. Another provision was that any member who should fail to pay the monthly payment as so provided, or should fail to pay the local council dues quarterly during January, April, July and October, should thereby become suspended, and during such suspension the benefit certificate should be absolutely null and void. There were provisions by which a member who had been suspended might be reinstated if in good health at the time of the reinstatement. The plea alleged that Lane failed to pay any council dues, and failed to pay the monthly assessment for the month of March, 1903, and that by reason

of his failure to pay the local council dues and the monthly assessment for that month on or before the last day of March he became suspended from the order and his benefit certificate became absolutely null and void, and that he was never afterwards reinstated, nor did he afterwards make those payments. To this plea plaintiffs replied that on divers months preceding March, 1903, defendant permitted Lane to pay assessments upon said certificate long after the same were due, and assured Lane that although it was irregular, yet if the same and the dues were paid within a reasonable time after due it would see that his certificate did not lapse; that defendant led deceased to believe that such conditions of payment set forth in said plea would not be insisted upon nor relied upon; and that by reason thereof defendant waived said several conditions set forth in its plea. Defendant filed a rejoinder traversing said averments of the replication, and an issue was formed upon that rejoinder. There was a jury trial, at the close of which, on motion of defendant, the jury were instructed to find the issues for the defendant. Such a verdict was rendered, a motion for a new trial was denied, defendant had judgment, and plaintiffs appeal.

A defendant who moves to instruct the jury to find in its favor admits the truth of all opposing evidence and of all inferences which may fairly and rationally be drawn therefrom. If there is evidence which fairly tends to establish plaintiff's case, the court is not at liberty to weigh the evidence under such a motion and to determine where the preponderance lies, but that question must be submitted to the jury. *Missouri Malleable Iron Co. v. Dillon*, 206 Ill., 145; *Blakeslee's Express Co. v. Ford*, 215 Ill., 230.

Although a life insurance policy or a benefit certificate provides for its forfeiture for nonpayment of premium or dues at a specified time, the company may waive prompt payment. Unless the circumstances show a clear intention to declare a forfeiture, it will not be enforced. Where the course of dealing of the company with the insured has been such as to induce a belief that the provision for a forfeiture will not be insisted upon, the company will not be allowed to

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set up such forfeiture against one in whom its conduct has induced such belief. Conduct on the part of an insurance company or a beneficial society which amounts to a recognition of a member's continuing membership after he has made default authorizing his suspension will waive the default. The receipt of payments after the default in payment is a waiver. 2 Bacon on Benefit Societies, sec. 433; Conductors' Benefit Association v. Tucker, 157 Ill., 194; Grand Lodge A. O. U. W. v. Lachmann, 199 Ill., 140; Illinois Life Association v. Wells, 200 Ill., 445; U. S. Indemnity Society v. Griggs, 118 Ill. App., 577.

Lane paid no monthly payments for October or November, 1902, but was credited therewith as compensation for services in assisting in the organization of the local council. Under the rule already stated his monthly payment for December was due on the first day of December, and was required to be paid on or before the last day of that month, and the penalty therefor was that by failing to pay by the last of December he should thereby become suspended and his benefit certificate null and void. Nevertheless, Cross, the deputy organizer of the supreme council, and the temporary president of the local council, wrote Lane on January 7, 1903, a letter, the body of which was as follows: "The December payment on your insurance was due the 31st. The secretary has not sent in her remittance yet, and while it is not exactly regular, if you remit in the near future I shall see that you do not lapse." Each member had a receipt book containing printed forms for the receipt for each monthly payment for several years. Cross, the deputy organizer, receipted for this December payment on the receipt book under date of January 22, 1903. Grace A. Cross, a sister of H. A. Cross, was secretary, and the monthly payment for January, 1903, is receipted in Lane's receipt book over the signature of said secretary as paid January 31, 1903. Miss Cross, however, testified that she did not receive any money nor put any dates on the receipt book, but that this was really done by her brother, H. A. Cross, who really acted as secretary, and that all she did was to write

her signature after he had written in the date, and that she had no knowledge whether the dates were correct. H. A. Cross testified that this payment was not made in January, but early in February; and while at first somewhat doubtful about this, he became positive before his examination was finished. Therefore, on January 1, 1903, and on February 1, 1903, there had been such a default by Lane as authorized the society to treat him as suspended and his certificate as null and void. Yet they did not so treat it, but received the money and wrote him pleasant replies. The February payment is receipted in the receipt book by Miss Cross under the date of February 28th and H. A. Cross testified that his recollection was that it was paid within the month, yet his letter acknowledging its receipt was dated the 12th of March. He however admits in that letter having received the remittance at an earlier date and having neglected to answer. On January 1, 1903, Lane's local council dues for the quarter became due, and in a letter dated December 16, 1902, Cross had called his attention to that fact. He never paid those council dues, yet although their non-payment authorized the society to treat him as suspended and his certificate as null and void, Cross in a letter to Lane dated March 12th, about the date when Lane went to the hospital, mentions again to him the time when the local dues were payable and that he had mentioned this to him in a former letter, and that he had no doubt it had slipped Lane's mind, clearly showing that the society had then no intention of forfeiting his certificate because of that nonpayment. The correspondence also shows that the delinquencies were not wholly on the part of Lane. As before stated, Lane had sent his certificate back from Missouri to Cross to have it countersigned by the officers of the local body, upon such officers being elected. It was so countersigned on November 25th, yet Cross did not then return the certificate to Lane. Cross also had Lane's receipt book, so that Lane had no evidence in his possession that he was a member of the order. Under date of December 12th, Lane wrote to the supreme secretary at Aurora about this, and on December 15th the

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supreme secretary replied to him that his letter had been referred to Mr. Cross at Rockford, and he would reply, and that this was doubtless an oversight in Mr. Cross. On December 16th Cross replied to Lane acknowledging he had had the certificate some time and the receipt book, and that he had intended to send the certificate but had neglected to do so, but assuring him that the insurance had been kept in force regardless of where his certificate was, and Cross apologized for having been so negligent in not sending the certificate sooner. So, too, in the letter before referred to of March 12th, Cross apologized to Lane for not having sooner acknowledged the receipt of his remittance, and it seems he had retained the receipt book until that date, which receipt book had evidently been sent in with the remittance. This letter of March 12th and all the letters from Cross to Lane are of a very friendly character. There is nowhere in this correspondence any suggestion that there was any thought or purpose of taking advantage of any of Lane's delinquencies to forfeit his certificate. We feel constrained to hold that this was testimony fairly tending to establish the truth of the replication, which averred that the society had permitted Lane to pay assessments on his certificate long after the same were due, and had assured Lane that although the same was irregular, if the dues were paid within a reasonable time it would see that his certificate did not lapse, and that defendant had allowed Lane to believe that the conditions of payment set forth in the plea would not be insisted upon or relied upon. We therefore conclude there was such evidence on the subject of waiver that the court was required to submit that issue to the jury, and erred in instructing the jury to find the issues for the defendant.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

**Village of Hampton v. Chicago, Milwaukee & St. Paul
Railway Company.**

Gen. No. 4,610.

1. *DEMURRER*—*what not reached by.* The question as to whether a municipal corporation can recover under each of a number of different counts for violations of an ordinance or can only recover for one violation, upon the theory that there was but one, namely, a continuing violation, cannot be raised by demurrer but should be raised by motion to require an election under which of the several counts such municipality would proceed.

2. *CHANGE OF GRADE*—*power of municipality to fix recurring penalties for continuing violation of ordinance providing for.* A municipality has power to provide a penalty for each day that a railroad company shall fail to comply with an ordinance changing the grade of a street.

Action of assumpsit. Appeal from the Circuit Court of Rock Island County; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1905. Reversed and remanded. Opinion filed March 10, 1906.

GEORGE W. WOOD, for appellant.

WILLIAM H. MEESE, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

The village of Hampton brought an action of debt in the County Court against the Chicago, Milwaukee & St. Paul Railway Company to recover penalties for the maintenance and use of tracks at certain street crossings in said village at an elevation different from the grade established by an ordinance of the village adopted in 1902. The trial court sustained a general demurrer to the declaration, and defendant had judgment which judgment we reversed in 118 Ill. App., 621, and remanded the cause. In that opinion section four of said ordinance is set out. After that case had been appealed to this court, the village, on September 3,

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1904, amended section four of said ordinance so that the part material here reads as follows:

"Section four. Be it further ordained that it shall be and is hereby declared to be unlawful to construct or maintain or use any embankment, railroad track or other structure in, along or across any of the streets or alleys of said village at any grade except the grade established by this ordinance, and any person or persons, company or companies, incorporated or unincorporated, having any embankment, railroad track or other structure in, along or across any of the streets or alleys of said village are hereby required to bring the same to the grade established by this ordinance, and any person or persons, company or companies, incorporated or unincorporated, who shall erect or construct any embankment, railroad track or other structure along or across any of the streets or alleys of said village, at any grade except the grade established by this ordinance, at any time, or shall maintain or use any embankment, railroad track or other structure in, along or across any of the streets or alleys of said village at any grade except the grade established by this ordinance at any time after forty days from the passage of this amendment to said ordinance shall be deemed guilty of a misdemeanor and shall be subject to a fine of Twenty-five (25) Dollars for each and every offense, and each day that any such embankment, railroad track or other structure is maintained or used at any grade, except the grade established by this ordinance, is hereby declared to be a separate offense, and such fines may be recovered in any manner provided by law."

On December 19, 1904, the village brought this action of debt against said railway company in the Circuit Court, and filed an amended declaration based upon daily violations of said amended ordinance after the expiration of the forty days specified in said amended section four. The amended declaration contained sixty-six counts, based on violations for sixty-six successive days. The court sustained a general demurrer to the amended declaration and dismissed the suit, and the village appeals.

In our former opinion between the same parties we held the ordinance valid, and practically disposed of every contention now made by appellee. It argues, as it did before, that the failure to comply with the ordinance can only be one offense, and for it there can be but one penalty inflicted, and that in any event the recovery cannot exceed \$200. If so, that would not support a demurrer. Even if but one violation can exist and but one recovery be had, still each count of the declaration is good, and appellee could only have asked the court to compel appellant to elect upon which count it would proceed or to give an instruction limiting the recovery. But we adhere to our former opinion on these questions. Each count charged that defendant was a railroad company and had its railroad constructed along, upon and across the streets of said village (a municipal corporation of the State of Illinois organized under the general act for the incorporation of cities and villages), at a higher grade than the grade established by said ordinance (both the original ordinance and the amendment being duly set out), and more than forty days after the passage of said amendment, and that said defendant on the date named in such count (which date was different from that named in any other count) maintained and used a railroad grade or track at a grade higher than and different from that established by said ordinance. Paragraph 25 of section 1 of article 5 of the act relating to cities and villages gives city councils in cities and boards of trustees in villages power "to provide for and change the location, grade and crossings of any railroad." The power of municipalities to change the grade at which railroads cross streets is sustained by the principles laid down in *People ex rel. v. A., T. & S. F. Ry. Co.*, 217 Ill., 594. If the failure of a railway company for weeks and months to comply with such an ordinance can only be a single offense, then, as the penalty for a single offense is limited to \$200 by the 96th paragraph of said section of the statute above cited, it would follow that such a delinquent railway company could profitably pay one slight penalty for failing to comply with the ordinance, and could thereafter continue to disobey the

ordinance without the possibility of further punishment. It may be that the municipality could then enforce the ordinance by *mandamus*; but the railway company could resist such writ to the court of last resort without any risk of a further penalty; and if finally compelled to change its grade, could then do so with no further expense than if it had originally obeyed the ordinance. We are of opinion that municipalities are not so restricted in the power to enforce their ordinances, but that the statute was intended to give them power to prescribe penalties which will furnish an incentive to obedience to their ordinance. We therefore hold that the village had power to ordain that each day a railroad company maintains and uses a grade at variance with that established by ordinance, after the expiration of a reasonable period fixed for compliance, such disobedience shall be a separate offense, and punishable as such. There may therefore be a recovery for as many penalties as there are separate violations of the ordinance, no matter how great the aggregate sum, where, as here, the suit is brought in a court whose jurisdiction is unlimited in amount. If the suit had been brought before a justice of the peace, the recovery in a single suit would be limited to \$200.

The judgment is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1906.

Wabash Railroad Company v. Philip Warren.

1. **INSTRUCTIONS**—*must not be ambiguous.* The refusal of instructions proper in substance is not error where in form they are ambiguous.

2. **ADMISSION OF EVIDENCE**—*when error in, will not reverse.* The erroneous admission of evidence will not reverse where it does not appear that prejudice resulted.

Action on the case. Appeal from the County Court of Sangamon County; the Hon. GEORGE B. WATKINS, Judge, presiding. Heard in this court at the May term, 1905. **Affirmed.** Opinion filed March 20, 1906.

C. N. TRAVOUS, for appellant.

HENRY L. CHILD, for appellee; BLUFORD WILSON and PHILIP BARTON WARREN, of counsel.

PER CURIAM. This cause was before this court at the November term, 1903. The material facts and questions of law involved are stated in the opinion then rendered. 113 Ill. App., 172.

A third trial by jury resulted in a verdict and judgment in favor of the plaintiff, to reverse which the defendant again appeals. The evidence upon the question as to whether the horses were killed upon the public highway or upon appellant's right of way was, as upon the former trial, exceedingly close. There is, however, sufficient evidence in the record to

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sustain the verdict and since three juries have found the same way as to the facts, we do not feel warranted in disturbing the same.

It is urged that the court erred in refusing defendant's first instruction. While the instruction might well have been given, inasmuch as it is somewhat ambiguous we cannot say that its refusal constituted error. Furthermore the jury were fairly instructed upon the points sought to be covered by the same.

It is further urged that the court erred in admitting testimony as to the location of the right of way as originally laid out. While this was error we are satisfied that the jury were in no way influenced or prejudiced thereby, and that their verdict would have been the same had the testimony in question been excluded.

The attorney's fees allowed seem under the evidence to be reasonable, and were properly allowable under the statute.

The judgment will therefore be affirmed.

Affirmed.

Warren Milby v. J. W. Mowry.

1. **STATUTE OF FRAUDS**—*when promise to pay debt of another not within.* A promise to pay the debt of another in consideration of that other's discharge from the debt is not within the Statute of Frauds.

2. **CONSIDERATION**—*what is.* A detriment to the promisee is as valid a consideration as a benefit to the promisor.

Action of assumpsit. Appeal from the Circuit Court of Mason County; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

BLINN & COVEY, for appellant.

W. E. STONE and STONE & OGLEVEE, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action by appellee against appellant to recover certain indebtedness due to him from one Carter, which he

claims appellant assumed and agreed to pay. The justice of the peace before whom the suit was originally brought rendered a judgment for the defendant from which the plaintiff appealed to the Circuit Court, where the cause was tried by the judge without a jury. Judgment was there rendered in favor of plaintiff for the sum of \$54.75, to reverse which the defendant appeals.

The evidence discloses the following facts: During the year 1904, appellant was publishing a newspaper at Mason City. He also owned and operated a printing plant and office at Middletown, which was under the management of one Downer. On September 14, 1904, Downer absconded owing a board bill of \$65.50 to one Carter who conducted a boarding house at Middletown. On August 22, 1904, Carter was indebted to appellee, a merchant in Middletown. On that day he wrote to appellant at Mason City stating that Downer owed Carter a board bill and that if he, appellant, would assume the payment of the same, he, appellee, would credit Carter with the amount of the same and charge it to appellant.

Appellee testifies that in a conversation by telephone which followed, appellant accepted this offer, while appellant testifies to the contrary. Appellant afterward prepared a written contract by the terms of which he agreed to pay the debt of Downer upon condition that appellee would give him his printing to do, part of the bill therefor to be paid in cash and the balance to be credited on the Downer account. Appellee refused to sign such contract insisting that the whole amount to become due for printing should be credited upon said account. The evidence as to whether or not said offer was accepted by appellant is in direct conflict. Appellee testified that appellant accepted it, while appellant testified to the contrary. The trial judge held with appellee and we are unable to say that such finding was manifestly against the evidence.

Pursuant to said agreement appellee proceeded to credit the account of Carter upon his books with the sum of \$65.50, the amount of Downer's board bill, and gave Carter a receipt therefor. He then charged said sum to appellant and sent

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him a duplicate of the charge ticket, Appellant afterward did printing for appellee to the value of \$10.75 and then declined to do any more, whereupon appellee brought suit for the balance due.

The principal ground urged for reversal is that the alleged promise by appellant to appellee to pay the debt of Carter to appellee was within the Statute of Frauds, and not having been in writing was void. A determination of this question will dispose of the specific alleged errors of the court in its rulings upon the instructions.

Whether or not the undertaking by appellant upon which this suit is predicated, is within the Statute of Frauds depends upon the further question whether such undertaking was an original or collateral one. The evidence tends to show that the agreement between the respective parties was that appellant agreed with appellee that if he, appellee, would release Carter from his indebtedness to appellee, he, appellant, would pay Carter's indebtedness to appellee. That pursuant to such an agreement, appellee gave Carter a receipt for his indebtedness and canceled the same, and charged the amount of the same to appellant, the effect of which was to discharge both Carter's indebtedness to appellee and the indebtedness of Downer to Carter, leaving the liability of appellant to appellee the only indebtedness remaining, at least so far as appellee was concerned. The undertaking of appellant thus became an original and not a collateral one, and therefore not within the statute. "A promise to pay the debt of another in consideration of that other's discharge from the debt is not within the Statute of Frauds, as there remains no debt of another to answer for." *Bird v. Gammon*, 3 Bingham 880; *Ames' Cases on Suretyship*, page 30, and cases there cited; *Wood v. Corcoran*, 1 Allen, 405; *Eden v. Chaffer*, 160 Mass., 225; *Mulcrone v. Amer. Co.*, 55 Mich., 622; *Gale v. Edgerton*, 14 Minn., 194; *Meriden v. Zingsen*, 48 N. Y., 247.

It is urged by counsel for appellant that there was no consideration for the contract between appellant and appellee. We think the release by appellee of all rights against

Carter to the extent of \$65.50 is a sufficient consideration to support such contract. A detriment to the promisee is as valid a consideration as a benefit to the promisor. *Mulcrone v. Lumber Co.*, 55 Mich., 626; *Packer v. Benton*, 35 Conn., 343.

We find no prejudicial or reversible error in the rulings of the trial court upon the evidence or instructions.

The judgment will be affirmed.

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY v. GEORGE W. DAVIDSON.

1. **FENCES**—*statute providing that railroad company shall maintain, construed.* This statute contemplates that a railway company shall fence both sides of its right of way through the entire length thereof except at places therein expressly exempted, and at public station grounds and other points where public conveniences require the same to be open; and further that at all crossings of it by all roads or highways, including railroads, and excluding farm crossings, it is required to construct and maintain cattle-guards and connect its fences therewith.

Action to recover damages for injury to personal property. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

SHUTT, GRAHAM & GRAHAM, for appellant; JOHN G. DRENNAN, of counsel.

ROBERT H. PATTON, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

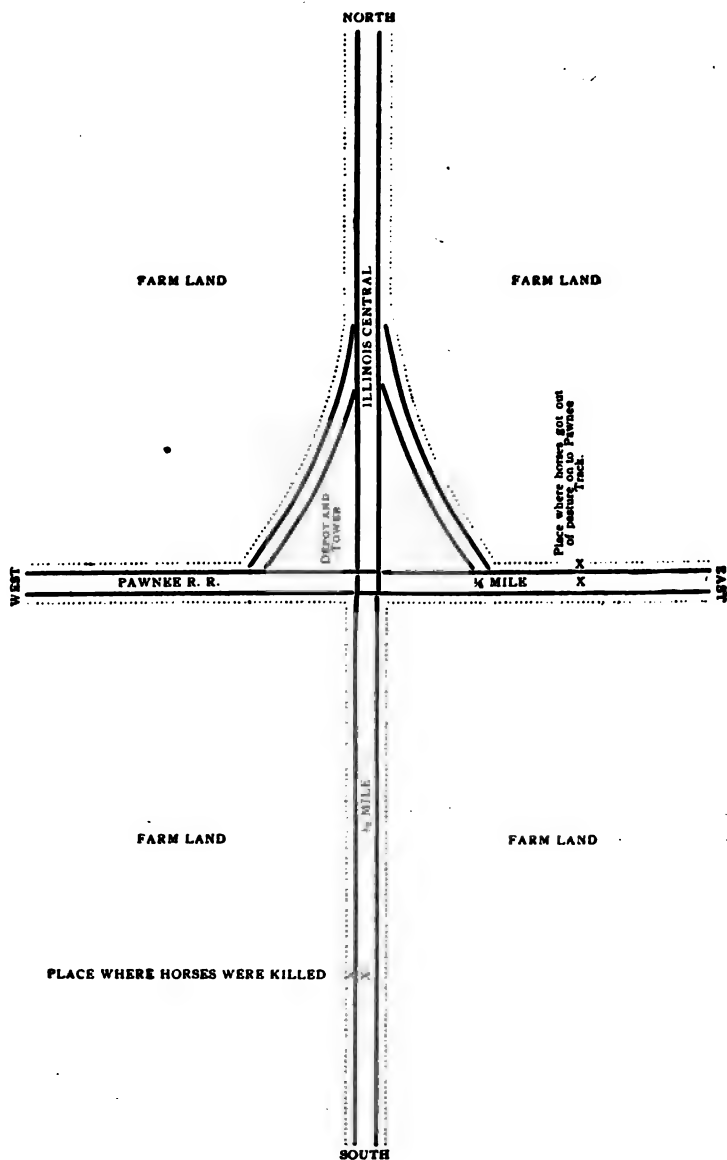
This is an action by appellee against appellant based upon paragraph 68 of chapter 114 of the Statutes, (Rev. Stat. 1903, page 1446) for the recovery of the value of live stock killed or crippled by one of the trains of appellant. Upon a trial by jury in the Circuit Court judgment was rendered against the defendant for \$1,375 damages and \$150 attorney's fees.

The section of the statute upon which the action is predicated is as follows:—

“That every railroad corporation shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad, except at the crossings of public roads and highways, and within such portion of cities and incorporated towns and villages as are, or may be hereafter, laid out and platted into lots and blocks, with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary, for the use of the proprietors of the lands adjoining such railroad; and shall also construct, where the same has not already been done, and thereafter maintain at all road crossings now existing or hereafter established, cattle guards, suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad; and when such fences or cattle guards are not kept in good repair, such railroad corporations shall be liable for all damages which may be done by the agents, engines or cars of such corporation, to such cattle, horses, sheep, hogs or other stock thereon, and reasonable attorney's fees, in any court wherein suit is brought for such damages, or to which the same may be appealed; but where such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or wilfully done.”

The evidence tends to establish the following facts: The Illinois Central railroad crosses the Pawnee railroad at Pawnee Junction, Illinois, at right angles. The fences of the two companies join so as completely to enclose the crossing. There is no public or private road over the crossing, nor any opening for use of vehicles or stock, nor any means by which stock can lawfully get on the railroad crossing. The junction is a wayside station about which no open ground is maintained for depot purposes.

The questions involved will be more readily comprehended by referring to the following plat, a copy of which appears in the record.



The nearest point of appellee's pasture to the crossing of the railroads is a quarter of a mile from the crossing; that is, marked in the plat, as the corner of appellee's pasture, where the horses went from appellee's land to the Pawnee Railroad right of way. From this corner the animals went west a quarter of a mile to the Illinois Central Railroad right of way, then south along the same one mile, to a cattle guard at the first highway. They then turned and went north about a quarter of a mile to a place where they were killed. They did not get through any fence belonging to appellant at any time. The declaration contains two counts, both predicated on the theory that appellant was bound to place cattle guards and wing fences at each side of the Pawnee Railroad crossing.

It is contended by appellant that the statute quoted imposes on a railroad company no duty to build cattle guards and wing fences to prevent the possibility of stock straying to its right of way from the line of another railroad which crosses it at a point where there is no public highway, and stock cannot legally be, and therefore cannot reasonably be expected to come.

The facts above recited are not controverted and a determination of the correctness of appellant's position will be decisive of all questions urged or argued by counsel.

The first part of the section of the statute quoted, requires that a railroad shall maintain fences on both sides of its road except at the crossings of public roads and highways and such portions of incorporated cities and villages that have been laid off into lots and blocks. It has been held that at public station grounds and at such points where public convenience requires the road to be open, a railroad is not required, under the statute, to fence its road. *R. Co. v. Guertin*, 115 Ill., 466. That public convenience and the practical operation of railroads requires that places where the tracks of one railroad cross with another should remain open, is obvious. It follows that if the duty to maintain cattle guards at the crossing of its railroad with that of the

Pawnee railroad is imposed upon appellant by the section in question, it must be under the provisions of the latter part thereof, which in brief provides that railroads "shall also construct * * * and * * * maintain at all road crossings * * * cattle guards suitable and sufficient to prevent * * * stock from getting on such railroad."

We are not disposed to hold, as contended by appellant, that by the language "all road crossings," public highways only are meant. In view of the fact that in the part of the section relating to fencing, the expression "public roads and highways" is used, it may be fairly and reasonably presumed that by the use of the more general and comprehensive expression "at all road crossings" the provision, so far as it relates to cattle-guards, was intended to require the maintenance of the same at railroad crossings as well as other crossings. This construction seems to be supported and warranted by the further fact that in the portion of the section relating to fencing, the word "road" only is used. If the word "road," as used in the second part of the section, was intended to refer to public roads and highways only, it is difficult to perceive why the more restricted expression "public roads and highways" should have been adopted in another portion of the same section and not in this connection.

We are of opinion that the statute in question should be construed as meaning and intending that a railroad shall fence both sides of its right of way through the entire length thereof except at places therein expressly exempted, and at public station grounds and other points where public convenience requires the same to be open; and further that at all crossings of it by all roads or highways, including railroads and excluding farm crossings, it is required to construct and maintain cattle-guards and connect its fences therewith. Statutes should be construed according to their express terms except where such strict construction would interfere with the convenience of the general public. As we have said, it is manifest that public convenience does not

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require that at the crossing of one railroad with another the rights of way of such railroads be left open. The object of the statute is not only to keep domestic animals off railroads, thus preventing injury to them and consequent damages to the owners, but to protect as well the lives and limbs of the traveling public.

If this be the correct view of the purpose of the statute, the questions whether or not the live stock in question were lawfully upon the premises adjoining the right of way, at what particular point they first got upon the right of way, and whether their presence there could have been reasonably expected, are immaterial.

The rulings of the trial court were in accord with the foregoing views and the judgment is therefore affirmed.

Affirmed

Mollie Reizer v. W. K. Mertz, Executor.

1. **ORDER OF DISTRIBUTION**—*what confers jurisdiction upon court to enter.* Jurisdiction to enter an order of distribution may be conferred by publication and where the order of distribution recites that it was entered upon "due proof of the publication of notice," the presumption is that jurisdiction existed.

2. **EXECUTOR**—*when cannot be ordered to account.* An order of the court of probate directing distribution of the estate of a deceased person to persons whom the court knows to be the heirs at law and entitled to the estate, is conclusive, and furnishes full protection to the executor, unless appealed from.

3. **DISTRIBUTION OF ESTATE**—*remedy of heir where, improperly made by order of court.* The remedy of an heir who asserts that the estate was improperly distributed, where such heir had no notice of the order of distribution, is against the parties who received the share of such heir and not against the executor.

Contest in court of probate. Appeal from the Circuit Court of Cass County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

JOHN W. PITMAN, for appellant.

R. W. MILLS, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from an order of the Circuit Court dismissing the petition of appellant that appellee, as executor of the will of Randall J. Adkins, deceased, be cited to show cause why an order discharging him as such executor should not be vacated, and he be required to pay to appellant her distributive share of the estate of said testator.

The facts involved are substantially as follows: Randall J. Adkins left a will by which, after some specific devises and bequests, he left the residue of his estate to his heirs at law to be divided in accordance with the Statute of Descents of this State. Letters testamentary under said will were issued to appellee by the County Court of Cass county. The estate was reduced to money as directed by the will and in October, 1901, the executor prepared and rendered a final report to the County Court. Notice by publication of final settlement in accordance with the direction of the county judge was given and the final report filed by the executor on November 4, 1901. The county judge being absent from the county at the time, the matter was continued from term to term until the February term, 1902. On the first day of that term, the executor presented said final report to the court for approval. At the same time the other heirs at law of Adkins filed an intervening petition alleging that appellant, who was designated by the name of Mary Brayman, and one Eliza Waldron, who were residuary legatees under said will, had been absent for a period of twenty-five years and that none of their relatives had heard from them in that time; that a presumption of their death before the death of the testator had arisen, and asking the court to order their shares distributed among the other heirs at law. Whereupon the court, after hearing the evidence of witnesses, which tended to confirm the allegations of the petition, on February 3, 1902, entered the following order, to-wit:—

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“And now on this day comes said executor and ~~makes~~ due proof of the publication of notice fixing upon this term of court for the filing of his account ~~current~~ and final report and the court having examined said report and there being no objections filed, the Court approves said report and orders that it be filed and entered of record. And afterwards, to-wit: on the same day comes Joshua T. Adkins et al. and present to the court their petition showing that there is now in the hands of said executor the sum of \$1,658.50 belonging to Mary Brayman and Eliza Waldron as per terms of will as residuary legatees which said petition states that said executor has made diligent search for said Mary Brayman and Eliza Waldron and has been unable to find them; and that said executor is about to deposit in the county treasury said sum of money; that neither Mary Brayman or Eliza Waldron have been heard from or of for more than 7 years; and petitioners further state that in law a presumption has arisen that said Mary Brayman and Eliza Waldron were dead at the date of the death of Randall J. Adkins, and that the legacies of said Mary Brayman and Eliza Waldron thereby lapsed and became a part of the estate of said Randall J. Adkins. Wherefore your petitioners make the said William K. Mertz, as executor, party defendant hereto and pray that he may be cited to appear and show cause, if any he have, why said sum of \$1,658.50 should not be divided among the other heirs of said Randall J. Adkins and if the court shall be of the opinion that diligent search has been made for said parties your Honor will make order for distribution as prayed for. And it appearing to the court from said petition and from the testimony of William K. Mertz and Joshua T. Adkins, sworn and examined in open court, and their depositions filed in this cause, as well as from the other records and files in this court, that the said Mary Brayman nor Eliza Waldron have neither been heard from nor seen for more than 7 years and that they nor either of them have been heard from since 1882. And that the presumption of law is that they are dead; that the sum of \$1,658.50 belonging to said Mary Brayman and Eliza Waldron as per terms of said will be divided among the other heirs of Randall J. Adkins as per provision of will. It is further ordered that said executor bring receipt in court for

said amount either from attorney for heirs or from heirs themselves."

The executor pursuant to such order thereupon distributed the funds in his hands in accordance therewith.

On August 12, 1905, appellant, who had been living in the State of Kansas, and until the fall of 1904 had no knowledge of the death of the testator, filed the present petition in the County Court. Upon a hearing that court denied the prayer of the petition. Appellant then appealed to the Circuit Court where, upon hearing, the petition was dismissed at her cost. To reverse said judgment of the Circuit Court she then appealed to this court.

The respective contentions of counsel present for our determination the question whether the county court, at the time of the entry of the order above set forth, had jurisdiction of, first, the subject-matter and, second, of the person of appellant. Jurisdiction of both the person and the subject-matter is essential to the validity of such order and if either was wanting the order is void. It is insisted by appellant that the effect of the notice of final settlement which was published in compliance with the statute and the order of the County Court, was merely to advise those interested that the executor had filed his final report and would apply for an order for distribution and discharge; that the court had no power under such notice, and upon a mere final proceeding for the settlement of an estate only to make a finding that one of the distributees was presumptively dead and to order her share paid other than to the county treasurer pursuant to the statute.

We are satisfied that the County Court, sitting in probate, had such constructive jurisdiction over the person of appellant as is contemplated by the statute, which provides that notice of final settlement shall be given "in such manner as the court may direct." Rev. Stat., section 112, chap. 3. The order of distribution expressly finds that "due proof of the publication of notice" of the intention of the executor to present his final account at that time has been made.

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The County Court in the administration of estates of deceased persons is a court of general unlimited jurisdiction and every presumption and intendment will be indulged to sustain its jurisdiction. *Frank v. People*, 147 Ill., 105. Where a court of general jurisdiction proceeds to adjudicate a cause, and there is no affirmative showing in the record to the contrary, there is a presumption of jurisdiction. *Forrest v. Fey*, 218 Ill., 165. We find nothing in the abstract of the record in the present case, affirmatively showing that proper constructive notice was not given to appellant, nor which is contradictory to the recital of the decree to that effect. It is not denied that the County Court had power to order distribution of the residuum of the estate and to decide all questions necessary to a correct distribution of the same, but it is contended that the court had no jurisdiction to order the payment of appellant's share to the other heirs, upon the mere presumption that she was dead, and that she being in fact living, the order was null and void. Whether or not the court had any such power we regard as immaterial. The record fails to show that appellee was guilty of any fraud or that he did not act in good faith. The mere fact that he failed to employ counsel to resist the petition and failed to appeal from the order is not sufficient to establish that fact. He was bound to obey the orders of the court of which he was an official and had a right to rely upon its orders. The order in question, whether authorized by law or not, we think furnished full protection to appellee in his compliance with the same.

An order of a probate court directing the distribution of the estate of a deceased person to persons whom the court finds to be the heirs at law and entitled to the estate is conclusive and furnishes full protection to the administrator unless appealed from. *Kellogg v. Johnson*, 38 Conn., 269; *Exton v. Zule*, 14 N. J. Eq., 501; *Sayre v. Sayre*, 16 N. J. Eq., 505; 18 Cyc., 632; *Paullissen v. Loock*, 38 App. 510; 2 *Woerner's Law of Administration*, sec. 506, p. 1129. In *Lowry v. McMillan*, 35 Miss., 147, it was held that a probate court has power to determine who are the distributees

of the estate and compel the administrator to deliver the assets to them and when acting in good faith under valid order, after due notice, he will be protected in the payment in accordance with the order. In *Ferguson v. Yard*, 166 Pa. St., 586, it was held that an executor who makes payment in accordance with the order of the Orphan's Court is protected by the decree and that it was immaterial that a refunding bond was not required from the distributees. In *Stewart's Appeal*, 36 Pa., 149, it was held that the administrator will be protected though the court subsequently open and change the decree. To the same effect is *Johnson v. Wilcox*, 53 Tex., 413. In *Young v. Thrasher*, 48 Mo. App., 327, the administrator, by the order of the probate court, paid one distributee more than his share and the court held the administrator was protected in the payment made in good faith. On *Baron v. Baum*, 46 La. Ann., 1103, it was held that when an administrator has distributed in accordance with the order of court he cannot be called to account by an heir subsequently appearing and claiming an interest in the estate. To the same effect are *Hill v. Lowden*, 116 Cal., 139, and *Sparhawk v. Administrator*, 9 Vt., 41. In *Hurt v. Hurt*, 6 Richardson's Eq. (S. C.), 114, it was held that a distributee absent from the state, but within the United States, who has been properly made a party by publication to the application for the distribution of an estate is concluded by the decree whether he had actual notice or not.

If the share of appellant was improperly distributed, she must look to the parties who received the same, and not to appellee. *Exton v. Zule*, *supra*; *Leavens Estate*, 65 Wis., 440. The case of *Thomas v. People*, 107 Ill., 517, cited by counsel for appellant, is not analogous to that at bar. The question there involved was as to the jurisdiction of the County Court to grant administration upon the estate of one who was living although presumed to be dead, which question does not here arise.

The decree of the Circuit Court is affirmed.

Affirmed.

**S. B. Miller, et al., v. Commissioners of Highways of
Town of Jonathan Creek, et al.**

1. **DEDICATION**—*how may be made.* The intention to make a dedication may be manifested by express consent or by acquiescence of the user; no particular form is necessary; it may be made with or without a writing.

2. **DEDICATION**—*how acceptance of, may appear.* The acceptance of a dedication may appear by acts showing an intent to receive the same.

Injunctional proceeding. Appeal from the Circuit Court of Moultrie County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

BRYAN H. TIVNEN and JOHN E. JENNINGS, for appellants.

SENTEL & WHITFIELD and HARBAUGH & THOMPSON, for appellees.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This was a bill in chancery for an injunction brought by appellants, landowners and taxpayers in the town of Jonathan Creek, against appellees, as commissioners of highways of said town, by which it was sought to enjoin said commissioners from letting any contract for the construction of bridges across Jonathan Creek intersecting the right of way of the Purvis road, and from expending any of the public moneys for such construction or for other improvement of said right of way. A temporary injunction was issued in accordance with the prayer of the bill. Upon the hearing of exceptions to the report of the master in chancery, the bill was dismissed at complainants' costs. To reverse such decree this appeal is prosecuted.

The following conclusions of fact by the master are admitted by appellants to be warranted by the evidence: That

a petition under the statute was filed with the commissioners on August 5, 1897, praying for the laying out of a public highway commencing at the northeast corner of the southeast quarter of section 21, town 14 north, range 6, east of the 3rd P. M. in said town, and running thence in a southerly direction on the most eligible route to the southeast corner of the northeast quarter of section 28, in Jonathan Creek township, which petition was granted; that commissioners caused a survey and plat to be made of said proposed highway, and spread upon the town record; that a trial was had for the purpose of ascertaining the damage of the various landowners, and damages were assessed; that the commissioners, September 14, 1897, finally granted said road to be laid out as follows: Beginning in the center of the public highway 118 feet south of the northwest quarter of section 21, town 14 north, range 6 east, and running from thence south 2,532 feet to a stone, thence south 2,680 feet to a stone in the center of public highway, as shown by plat, road being of the width of forty feet, the line of said survey being the center of said road, and declared it a public highway; that on September 26, 1897, commissioners required a new report of the survey of said proposed road to correct former report of surveyor, which described the road as one mile west of the location prayed for in the petition, and the new report was so filed; that an appeal was taken from the decision granting such road to three supervisors of the county of Moultrie, and by the latter tribunal, the commissioners' finding was reversed, and the prayer of said petition denied. That in October, 1903, Lawrence Purvis and others petitioned the commissioners to build two bridges upon the road here in controversy, but that the commissioners, at a special meeting on November 6, 1903, denied their right to build said bridges recording as their reason therefor, "that the road had never been accepted as a public highway." That on February 20, 1904, Lawrence Purvis, J. W. Bolin and others petitioned the commissioners to accept a road there described, alleging that said road had been a public highway for the past four years, dedicated to the public

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use, plat of which had been filed for record in the records of Moultrie county; and also that on May 31, 1904, said Purvis and Bolin executed a deed for land, to the supervisors of Moultrie county, for the use of the public generally, describing therein a road one mile west of the road in controversy. That in all reports and proceedings of the commissioners said to be in reference to the road in controversy, a road is described one mile west of the one here in question; that none of the deeds in evidence in this cause correctly describes the road in issue, or the land over which it passes; that the time the Purvis road was fenced out, it was the intention of the owners of the fee over which the road passed, to dedicate the same to the public as a highway; that the commissioners advertised notice of the letting of public contract for building of two bridges at public expense on this road.

Appellants contend that the location of the Purvis road is uncertain, unascertained, and not disclosed on the record; that no survey or plat of the same has been made and spread upon said town records; that the commissioners of said town have caused no work to be done, or materials furnished, or public funds expended, upon this road as a public highway or otherwise; that, on February 27, 1904, the commissioners did not accept said road as it was fenced and laid out, or otherwise; that the action of the commissioners on June 1, 1904, did not constitute an acceptance of this road; that the deed of July 28, 1904, by Purvis and Bolin was improperly admitted in evidence, because it was made after the commencement of this suit, and has never been considered or acted upon by said commissioners or shown upon the town records and does not locate the road; that there has been no dedication, express or implied, or grant and acceptance of said road; that it was and is a private way, and would be an unnecessary burden upon said township to accept it; that the evidence sustains the bill, and the injunction ought to be made perpetual on the record.

The main question here involved is whether or not the Purvis road in question had been dedicated and accepted by

the commissioners. A determination thereof will be decisive as to propriety of the final decree of the Circuit Court. Whether or not the road was dedicated depends upon the intention of the owners of the land. *Woodburn v. Town*, 184 Ill., 208. Notwithstanding the line of the road was incorrectly described in both the offer by Purvis and Bolin to dedicate and in the deed afterward executed by them, we are of opinion that an intention by them to dedicate the land over which the road in controversy passes as a public highway, clearly appears from the evidence, which shows that said owners shortly after the acceptance by the commissioners of their offer to dedicate, fenced out the land over which the present road actually passes.

A dedication may be made by grant or written instrument; it may be evidenced by acts and declarations without writing, no particular form being required to establish its validity, it being purely a question of intention. The mode of making dedications is immaterial. They are not within the Statute of Frauds, and are good by parol. The intention of the party manifested by express consent, or acquiescence in the user, will govern in determining whether it be a dedication. *Godfrey v. City*, 12 Ill., 29; *Warren v. The President, etc.*, 15 Ill., 236. No particular formality is required to constitute a dedication; it may be made either with or without writing, by any act of the owner, such as throwing open his land to the public use and travel, thereby indicating a clear intention to dedicate. *Harding v. Town*, 83 Ill., 501. The fencing out of a strip of land by the owner affords strong evidence of its being left for a highway, and, without contravening evidence, must be accepted as satisfactory evidence of its dedication. *City v. Hill*, 124 Ill., 646; *Woodburn v. Town*, *supra*.

The intention of the commissioners to accept the same in behalf of the public is shown by the facts appearing in evidence, that from the time of the attempted acceptance until the day of the hearing, the road had been traveled by the public generally and was well-defined; that the same had been worked, graded and improved by placing rock and

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gravel thereon and by placing a wooden culvert across the same, and that the commissioners had advertised notice of a proposed letting of a contract for the building of bridges across the same. *Town v. Town*, 60 Ill., 58.

Immediate formal acceptance by some competent authority cannot be necessary to give effect to a dedication of land to the public use. *Town v. LeBahn*, 120 Ill., 92; *Woodburn v. Town*, *supra*. Where a road is outside of a municipal corporation, no particular acts are required by the law to constitute an acceptance. Where it is traveled, recognized and worked upon as a highway, a presumption of acceptance arises, and where no repairs are needed, use by the public sufficiently long and general to evidence an acceptance will be sufficient. *Town v. Town*, *supra*; *Board v. Holly*, 169 Ill., 9; *Alvord v. Ashley*, 17 Ill., 363; *Town v. LeBahn*, *supra*. It is not essential that there should be any prescribed formal act of acceptance. *Little v. City*, 106 Ill., 353.

We are satisfied that the chancellor was warranted in finding that the Purvis road in question was the road intended to be dedicated to the public for public use, and that commissioners intended to accept the same as a public road.

The contention of appellants that travel of a private way of the width of thirty feet only, is not sufficient under the statute to make it a public road, and that it is uncertain whether one, forty or thirty feet in width was accepted, is without force. The provision of the statute referred to relates only to roads established under the act authorizing the establishment of highways by petition and has no relation to those established by dedication. *Rev. Stat. 1903*, page 1592. Where a road is established by a common law dedication and acceptance, its width is fixed by the act of the owner in his offer to the public and that of the public accepting the same.

The decree of the Circuit Court is affirmed.

Affirmed.

Felix McGee v. Odis McGee.

1. **ASSUMPSIT—when lies.** Assumpsit lies whenever a defendant has money of the plaintiff which in equity and good conscience he has no right to retain.

Action of assumpsit. Appeal from the Circuit Court of Edgar County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906

R. W. FISK and H. S. TANNER, for appellant.

H. VAN SELLAR and F. C. VAN SELLAR, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is a suit in assumpsit by appellee against appellant for the recovery of the sum of \$500 which it is claimed appellant received for the benefit of appellee and ought not, in good conscience, retain.

The declaration consists of the common counts only. The cause was tried by jury resulting in a verdict and judgment in favor of the plaintiff, to reverse which the defendant appeals.

The evidence tends to show the following facts: Appellee during a visit to Kansas made a contract with one McCoy for the purchase of a tract of land in that State, for the sum of \$5,000. As the first payment thereon he gave his note to McCoy for \$500, which appellant signed as surety. It was further agreed that in case appellee should fail to comply with his agreement to purchase, he was to forfeit said first payment. When McCoy afterwards came to Illinois to consummate the trade, appellant in the presence of appellee informed McCoy that he had concluded not to take the land and refused to pay the note. Appellant then agreed to take the land at the same price with the understanding that he was to receive credit for the note upon which he was surety and which was not yet due, as a part of the

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purchase price. Pursuant to said agreement the land was conveyed to appellant who paid to McCoy, by assuming a mortgage upon the land, and in cash, the sum of \$4,500. When the note fell due, McCoy, at the instance of appellant, assigned the same to his partner, one Kerns, who brought suit against appellee upon the same, and recovered judgment for the amount due thereon, which appellee afterwards paid and then brought the suit at bar.

While the evidence is conflicting and somewhat close, we are unable to say that the jury who saw and heard the witnesses, were unwarranted in finding the facts to be as above stated.

It is well settled that an action for money received may be maintained whenever the defendant has obtained money of the plaintiff which in equity and good conscience he has no right to retain. When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties. *Alderson v. Ennor*, 45 Ill., 128; *Bank v. O'Hare*, 119 Ill., 646.

Applying this rule to the facts above set forth, we are satisfied that the judgment is right. Appellant had received the benefit of the same when he purchased the land, having received credit for it on the purchase price. Appellee having been compelled to pay the note representing the money, is, we think, clearly entitled in equity and good conscience to recover the same from him in this form of action. Inasmuch as appellee is not seeking to recover the costs of the suit upon the note, we cannot see how appellant could have been injured by reason of the default suffered by appellee. If appellant received credit for the note on the land purchased from McCoy he should have paid the same. The fact that he failed to do so but compelled McCoy to recover the same from appellee by suit, is a matter of which he should not be allowed to take advantage. If appellee had paid the note without suit, he would have a clear right of recovery against appellant. In either event, appellant would be compelled to pay the sum of \$500 only, of which he has had the full benefit.

No error was committed by the court in its rulings upon the evidence and instructions and the judgment will be affirmed.

Affirmed.

Nathaniel H. Boone v. Peter W. Rickard.

1. **STATUTE OF FRAUDS**—*when contract does not concern sale of interest in land.* A contract by which several owners of land agree jointly to erect a pumping station, etc., in order to reclaim lands subject to overflow, does not concern the sale of an interest in land, and, therefore, need not be in writing.

2. **CONTRACT**—*when memorandum of, incompetent.* A memorandum made by a witness as to the terms of a contract which represents his conclusions from what was said, is incompetent.

Action of assumpsit. Appeal from the Circuit Court of Cass County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

A. A. LEEPER, for appellant.

R. W. MILLS, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit by appellee against appellant for the recovery of the sum of \$400 alleged to be due appellee under a tripartite contract between said parties and Harbison and Goodell. A trial by jury resulted in a judgment in favor of the plaintiff for \$310, to reverse which this appeal is prayed by the defendant.

The material facts appearing in evidence, briefly stated, are as follows: In October, 1904, appellant, appellee, Harbison and Goodell, were severally the owners of large adjoining tracts of land lying adjacent to the Sangamon river and subject to overflow therefrom; that in order to reclaim said lands it became necessary to erect a levee, dig ditches and erect a pumping station thereon; that said landowners

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accordingly verbally agreed with each other to expend the sum of \$1,000 for the purpose of making said improvements; that appellant and appellee each agreed to contribute to such fund \$400 and Harbison and Goodell agreed to contribute jointly the sum of \$200; that it was agreed that the work should be done and the machinery erected by appellee and Harbison, who, pursuant to said agreement, proceeded to build a levee and dig ditches and install a pumping plant; that as the result of such improvements the lands in question were thereafter protected from the overflow, and the surface water pumped off the same; that the cost of said improvement was about \$1,040, of which sum Goodell and Harbison paid \$200 in accordance with the contract, and the balance was paid by appellee; and that appellant expended the sum of \$90 in the erection of an engine house to be used in connection with the plant.

To the declaration, which avers substantially the foregoing facts, appellant interposed a special plea, setting up the Statute of Frauds. To such special plea the plaintiff pleaded three replications, as follows: First, denying that the contract was concerning an interest in lands; second, averring that the contract was to be fully performed within one year; and third, that plaintiff should not be precluded by anything in the plea alleged because after making the several promises mentioned in the declaration, the defendant stood by, and without objection, allowed the plaintiff to expend the said several sums of money upon the faith of the agreement of said parties. Issue was joined on the first two replications and defendant demurred to the third. Demurrer overruled and defendant stands by his demurrer.

When the work was finished the question arose between the parties as to the propriety of having a written agreement between them in regard to the purchase of an engine and the future maintenance of the levee and the pumping station. After a number of conferences and the preparation of several written contracts, none of which were satisfactory to all of the parties, efforts in that direction were abandoned. Appellant then refused to pay any portion of

the cost of the improvements. The suit at bar was then instituted for the recovery of the sum which appellant had agreed to contribute. In assessing the damages, the jury credited appellant with the amount expended by him in the erection of the engine house, and returned a verdict for the balance.

The first error assigned is that the court erred in overruling the demurrer to the third replication. We think the demurrer should have been sustained not only to the third but to all of the replications, and further that it should have been carried back to the plea itself. The contract is no way involved in the sale of any lands or any interest in or concerning them and it was therefore unnecessary that it should have been in writing and signed by the parties to be charged therewith. The Statute of Frauds has no place in the case.

It is next urged that inasmuch as appellee and Harbison jointly made and paid the cost of the improvements, appellee individually has no right to recover. Such contention is without force or merit. Appellant agreed to contribute \$400 toward the cost of the improvement to the lands. On the faith of such agreement and with full knowledge on the part of appellant, appellee proceeded to do the work and pay the cost thereof. The money was paid at the instance and request of appellant and he is clearly liable therefor, both at law and in equity.

The court properly refused to admit in evidence the memorandum of the proposed contract prepared by the banker Mertz. While it was competent for Mertz to state all that was said by the parties in his hearing and presence, the memorandum was but his written conclusions as to the purport of the conversation and manifestly inadmissible.

Appellee's right of recovery was so clearly established by the uncontroverted evidence that we are not inclined to disturb the verdict because of the erroneous rulings of the court upon the pleadings or instructions, which under the circumstances were not prejudicial.

We believe that substantial justice was awarded by the judgment and it will accordingly be affirmed.

Affirmed.

Emerson Womacks v. Minnie Womacks.

1. **SOLICITOR'S FEES**—*when allowance for, in divorce proceeding, improper.* Solicitor's fees for past services rendered in a divorce proceeding which has been abandoned cannot be allowed.

Divorce proceeding. Appeal from the Circuit Court of Vermillion County; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the November term, 1905. Reversed. Opinion filed March 20, 1906.

A. J. MILLER and W. G. SPURGIN, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court directing appellant to pay to appellee, his wife, the sum of \$60 for her solicitor's fees. Appellee filed a bill for divorce against appellant returnable to the October term, 1904. On October 5th appellant filed an answer to the same, together with a cross-bill for divorce. On November 12th appellee answered the cross-bill. At the same time she filed a petition for temporary alimony and solicitor's fees, accompanied by an affidavit to the effect that appellant was worth the sum of \$40,000. The cause was tried by a jury, which, on December 10th, returned a verdict finding both defendants not guilty. Motions for a new trial were filed by both parties. At the May term, 1905, said motions were withdrawn and the original and cross-bills dismissed by the court for want of equity. The petition for alimony and solicitor's fees was then presented to the court for the first time and a hearing had thereupon. Appellee's solicitors introduced the accompanying affidavit in evidence over the objection of appellant, whereupon the court entered the decree here in question.

The decree must be reversed for the following reason: Although appellee's solicitor might have obtained an order

for the payment of fees *pendente lite* on making a proper case, yet both bills having been abandoned before such order was obtained, the right to the same was lost. Appellee should have procured an order while the suits were being prosecuted, and having failed to do so her application was too late. *McCulloch v. Murphy*, 45 Ill., 256. Had she been successful in her suit, the services of her solicitor, although rendered in the past, could properly have been taken into account in the final decree, but she having abandoned her suit, no power remained in the court to order the payment of fees to her solicitor for past services. *Anderson v. Steger*, 173 Ill., 112.

The decree will be reversed without remanding.

Reversed.

James A. Christy, et al., v. A. W. Christy, Administrator.

1. PROPOSITIONS OF LAW—*when need not be presented.* Propositions of law need only be presented where a right of trial by jury exists and the same, in the particular case, has been waived.

2. ADMINISTRATOR—*may pass title to personal property.* An administrator may pass title to personal property notwithstanding the sale thereof is made without authorization of an order of court, providing he acts in good faith.

3. ADMINISTRATOR—*when not liable for selling personal property without order of court.* Where an administrator has used such a degree of intelligence as a man of ordinary prudence would have exercised, he is not personally liable for selling personal property without the authorization of an order of court.

Contest in court of probate. Appeal from the Circuit Court of Greene County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

WILLIAM G. BUSBY, RUSSELL KNEISLEY and HENRY T. RAINEY, for appellants.

F. W. LEHMANN, D. M. KIRBY and H. P. NOBLE, for appellee.

Christy v. Christy.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an appeal by several of the heirs at law of Julia A. Christy, deceased, of whose estate A. W. Christy, also an heir at law, is administrator, from an order of the Circuit Court overruling their exceptions to a report of said administrator of the sale of 71 shares of the capital stock of the Wiggins Ferry Company, a corporation. The shares in question were sold by the administrator without an order of the County Court, for the sum of \$600 per share. It is contended by appellants that the administrator should be required to account for a larger sum than that realized. The trial judge by his rulings upon the propositions of law presented in behalf of the respective parties, held that the administrator should be charged with such a sum, on account of the sale of the stock in question, as he might have received had he exercised due and proper diligence; that he was bound in the management and sale of the stock to use that judgment, care and diligence which a reasonably prudent man would have exercised under like circumstances; that although he may have acted in the utmost good faith, he was nevertheless liable for any loss the estate may have sustained through a failure to exercise such degree of care; that the statute requiring an administrator to obtain an order of court before selling personalty at private sale is not mandatory; that if the present administrator proceeded without such authority and sold the stock at private sale upon his own judgment alone, he was not held to a greater degree of diligence than if he had proceeded under an order of court under the statute; and that although he may have failed to sell the stock for the best price obtainable he was not liable to account for the same at that price, provided he had exercised due diligence. It is contended that in this respect the court erred. In proceedings of this character it is unnecessary to submit propositions of law in order to have reviewed the questions of law presented by the record. The statute applies only to cases where the parties are entitled to a trial by jury and such right has been waived. We

are of opinion, however, that the law applicable to the facts presented, is as held by the court. The legal title to the personal estate of his intestate was vested in the administrator (*Neubrecht v. Santmeyer*, 50 Ill., 74), and we see no reason why he had not the power to pass such title at private sale, if made in good faith, although without an order of court (*Horner's Probate Law*, 484; *Burnap v. Dennis*, 3 Scam., 482), provided that in making such sale he exercised such degree of care and diligence as a reasonably prudent person would have exercised under like circumstances. It is unquestionably true that, except in rare cases, it is proper and advisable for an administrator, before selling the personal property of his intestate, to obtain authority from the probate court so to do, thus protecting himself, where he has acted in good faith, from the charge of a lack of diligence in obtaining a fair price therefor, but our attention has been called to no authorities holding that a failure to do so imposes upon him a greater degree of diligence than he would be otherwise bound to exercise. We therefore conclude that the only question for our determination is whether the trial court was warranted, under the evidence, in holding that the administrator acted in good faith, and that, in making the sale, he used the same judgment, care and diligence as a reasonably prudent person would have exercised under like circumstances to obtain the best price possible for the stock. Unless the findings of the trial judge upon this question, which is clearly one of fact, were manifestly contrary to the evidence, we are not at liberty to disturb the same.

The evidence tends to disclose the following facts: Julia A. Christy died intestate in Greene county, Illinois, about 1894, leaving a sister and three brothers as her heirs at law. A part of the assets of her estate consisted of 71 shares of the stock of the Wiggins Ferry Company, a corporation conducting a ferry business across the Mississippi River at St. Louis. Prior to that time a dividend of 8 per cent. per annum had been paid upon the stock and it was worth not to exceed \$250 per share. On April 29, 1902, for some rea-

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son which does not appear in evidence, the estate was still unsettled and the assets undistributed. On that day the administrator sold and delivered the stock in question to the Mississippi Valley Trust Company for \$600 a share. At that time two competing railroad companies were endeavoring to acquire control of the corporation and were respectively represented by said Mississippi Valley Trust Company and the Mercantile Trust Company, both of St. Louis, Missouri. Strenuous efforts were made by each of said trust companies to acquire a sufficient number of shares of stock to control the corporation and with this end in view a number of blocks of stock were purchased by them at abnormal prices ranging from \$555 to \$1,500 per share. This resulted in an excited condition of affairs for the reason that if either company acquired a majority of the stock or should cease its efforts in that direction, it was obvious that the stock would resume its normal value. For this reason the prices paid for the stock fluctuated so quickly and so greatly that its value became almost altogether a matter of mere speculation. There is evidence tending to show that the administrator was active in endeavoring to obtain the best prices possible for the stock held by him and was fully alive to the possibilities of the situation. While it is possible that one accustomed to handling stocks in like extraordinary situations might have by unusual shrewdness, skill and discretion, obtained a better price for the stock, we are of opinion, after a careful perusal of the evidence, that the trial judge was not warranted in finding that the diligence and judgment exercised by the administrator was such as would have been used by a reasonably prudent person, under like circumstances. Neither was the court unwarranted in finding that the administrator acted in other than good faith. There is no evidence from which bad faith can be inferred. What has been said disposes of the contention that the administrator was guilty of *devastavit*.

The decree of the Circuit Court will be affirmed.

Affirmed.

Illinois Central Railroad Company v. St. Louis & Northeastern Railway Company.

1. *MOTION TO DISSOLVE—when party making, may appeal from order granting injunction.* In the absence of a plea of release of errors, the fact that a motion to dissolve was made after the appeal was taken from an order granting an injunction, cannot be availed of as a ground for the dismissal of the appeal.

2. *CROSSING—right of traction company to make at point selected by it.* A traction company organized under the railroad act, where objection is made, cannot cross railroad tracks at any point selected by it, but such question must be submitted for determination to the Railroad and Warehouse Commission.

Appeal from interlocutory order granting injunction. Appeal from the City Court of Litchfield; the Hon. PAUL MCWILLIAMS, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded with directions. Opinion filed March 20, 1906.

Statement by the Court. This is an appeal from an interlocutory order granting an injunction against appellant. On October 16, 1905, appellee filed its bill in chancery against appellant and the City Court thereupon ordered a temporary writ of injunction to issue without notice, which was issued and served upon appellant on the same day. On October 28, 1905, the defendant filed with the clerk of the court an appeal bond which was approved by the clerk, in accordance with the statute providing "for appeals from interlocutory orders granting injunctions or appointing receivers."

The material averments of the bill are as follows: That complainant is a railroad corporation organized under the laws of Illinois, and has located and is constructing its line of railway and is grading and laying the rails thereof between Staunton and Hillsboro, passing through the city of Litchfield; that in so constructing its railroad, complainant is compelled to cross divers steam railroad tracks and rights of way already constructed or acquired by other railroad corporations between Staunton and Hillsboro, and that divers of said railroad corporations, particularly the C., B. & Q. Railway Company and the C., C. & St. L. Railway

Company, and the defendants, are unfriendly and hostile to complainant and are obstructing and endeavoring to obstruct complainant in the completion of its railroad by refusing to permit complainant to cross their tracks and by inciting other property owners to obstruct it; that the proposed railroad of complainant will be operated by electricity and is what is commonly called an "electric railroad"; that in its operation within cities and villages it performs the service of and is practically a street railway; that by reason thereof, property owners and business men of cities and villages through which it passes encourage and generally desire its construction through the business portions thereof, and as much in the streets as possible; that, by reason of its motive power and method of operation, much greater facilities will be afforded its patrons in passenger and freight service than is furnished by steam roads and that steam roads generally harass and incite opposition to complainant to its inconvenience and injury; that in order to meet with the requirements of the city of Litchfield and its citizens and business men, complainant located its line so as to pass over private property to within a quarter of a mile of the intersection of Sargent and Clinton streets, in the city of Litchfield, and thence over certain streets and alleys to the intersection of Sargent and Clinton streets, and thence eastwardly about three blocks to State street, the latter being the principal business street of said city, and thence north on State street to the north end thereof and around the city park and eastwardly on Water street out of said city; that upon petition of property owners owning a majority of the frontage on said streets and of each mile thereof, the city council of said city passed an ordinance granting to the St. Louis & Springfield Railway Company, the assignor of complainant, the right to construct and operate its railway on Sargent street from an alley next west of Clinton street eastwardly to State street and north thereon for a distance of four blocks and requiring said railway to be laid upon the established grade of said streets; that complainant made the necessary surveys, measures, and levels for constructing its railroad in said streets and acquired its right of way over

private property where required to connect with the points covered by said ordinance and has graded and constructed its railroad thereon and in the streets and alleys of said city to within about three hundred feet of the intersection of Sargent and Clinton streets and has installed its permanent crossing over the tracks of the C., B. & Q. Railway Company and the defendant in Sargent street; that the city of Litchfield is the owner in fee of Sargent street and has heretofore permitted to be constructed across the same three certain railroad tracks now operated as steam railroads and possessed and controlled respectively by the Wabash Railroad Company, the C., B. & Q. Railway Company and the defendant; and that said city also permitted certain other railroad tracks to be constructed across State street, which last mentioned tracks are possessed and operated by the C., C., C. & St. L. Railway Company; that each of said railroad tracks is constructed upon the grade of the street and are all, practically, on the same grade or level; that the tracks of the Wabash Railroad Company, the C., B. & Q. Railway Company and the defendant are at right angles to and across the tracks of the C., C., C. & St. L. Railway Company about three hundred and fifty feet north of Sargent street; and that in order to use and occupy Sargent street, under the term of said ordinance, complainant will be compelled to cross the tracks of the Wabash Railroad Company, the C., B. & Q. Railway Company and the defendant in Sargent street, and of the C., C., C. & St. L. Railway Company in State street; that the necessity therefor has been publicly known to the authorities of said city, county and State and of said four railroads for months; that since the passage of said ordinance complainant has been openly and publicly securing its rights of way and grading and constructing its railroad, and complainant had well hoped that the other railroad corporations would so unite with complainant that no objection would be made to complainant crossing their respective tracks in such manner as to enable complainant to construct and operate its railroad and comply with the wishes of the city of Litchfield and of its citizens and property owners; that complainant has applied to each of said

corporations to permit it to construct and place at its sole expense such necessary crossings and appliances as would provide grade crossings over each of said railroad tracks and has offered to install the same at its own expense and without any interference with the operation of the trains of said corporation; that it is entirely practical and safe to construct its railroad in Sargent and State streets across said tracks and so as not to interfere with the operation of trains on the latter or to increase the hazard of travel over the same, and that the railroad of complainant will be operated by means of single cars or, at the most, by trains but of a small number of cars, all capable of much quicker and easier control than steam cars, so that such operation will scarcely add more to the danger of operation of the other railroad tracks than the travel of an equal number of wagons upon said streets; that the Wabash Railroad Company has consented and agreed to the construction by complainant of such grade crossing, with a connection by means of a "Y" track between the tracks of the Wabash Railroad and complainant, so as to furnish cars to be transferred from one track to another, and has entered into a contract to that effect; that each of the other railroad corporations, and particularly the defendant, has refused so to do and threatens forcibly to resist the placing or maintenance and operation of any crossing by complainant over the tracks controlled by it, and to remove any and all material now placed or which may hereafter be placed by complainant in any part of Sargent street, which is occupied with the tracks of the defendant; that the defendant, the C., B. & Q. Railroad Company and the C., C., C. & St. L. Railway Company has each applied to the Board of Railroad and Warehouse Commissioners of the State of Illinois to act under the terms of the statute in such case made and provided and to compel complainant to cross said tracks at some other points and upon other grades than those required by said ordinance and to order that complainant shall go over or under said tracks; that the Wabash Railroad tracks are between those of the defendant and of the C., B. & Q. Railway, and about one hundred seventy-five feet

from the same respectively; that it is physically impossible to cross the tracks of the Wabash Railroad in Sargent street at grade and make such "Y" connection, as complainant has contracted with the Wabash Railroad Company to do, and to cross the tracks of the defendant and the C., B. & Q. Railway Company in Sargent street other than at grade; that as complainant has exercised its power to locate its railroad under its articles of incorporation, it is advised that its right is exhausted and it cannot re-locate the same upon another line so as to cross said tracks at other points than those specified in said ordinance; that the defendant is acting in concert with such other corporations in opposing complainant in the exercise of its rights as a common carrier and under the terms of said ordinance and in forcibly resisting the employés of complainant in the construction of its railroad and in threatening to remove the material, crossings and tracks now placed by complainant in Sargent street or which may hereafter be placed therein and in applying to the Board of Railroad and Warehouse Commissioners of the State of Illinois to compel complainant to abandon its rights under said ordinance and its right of way so acquired and to cross over or under the tracks of said company outside the city of Litchfield and at a point where it has no right of way and where its right to acquire the same is doubtful in law; that its conduct is unreasonable and in fraud of the rights of complainant and is pursuant to a conspiracy between it and other corporations to prevent complainant from entering the business portion of the city of Litchfield as a competitor in business and to enable them to maintain their present monopoly of the business of common carriers; that such conduct deprives complainant of its property without due process of law, and will constitute a permanent and irreparable injury to complainant; that complainant expressly denies that the Board of Railroad and Warehouse Commissioners have any right or authority to interfere with complainant in the construction of its road in Sargent street under said ordinance.

The prayer of the bill is that a temporary injunction issue

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against the Illinois Central Railroad Company, its agents, etc., enjoining them and each of them from forcibly or otherwise removing or from in any manner obstructing complainant or its agent in completing, placing and using any crossing, or other appliances in Sargent street as a part of any crossing of the railroad of complainant over any railroad track of the defendant in said street and also from further prosecuting or making before the Board of Railroad and Warehouse Commissioners of the State of Illinois any objections to the crossing by complainant of the tracks of the defendant in Sargent street in the manner prescribed by said ordinance, and upon a hearing, that said temporary injunction may be made perpetual.

Attached to and made a part of said bill of complaint is a copy of the ordinance referred to therein, which grants to the St. Louis and Springfield Railway Company, and its assigns, the rights to construct, maintain and operate for fifty years a railroad along certain public streets, including Sargent street, from State street to Clinton street, which is to be operated by electricity or any other motive power permitted by the city, except steam, and is to be used for the transportation of passengers, baggage, U. S. Mail, express matter and freight. It provides that the tracks shall be composed of "T" rails and shall be laid on the grade now established or hereafter established. It also provides that "no right or privilege hereby conferred shall be deemed or considered so as to conflict or interfere with any rights or privileges now held, possessed or enjoyed by any person, company, or corporation under any privileges or franchises heretofore granted by said city, to which rights all the rights hereby conferred shall be subject." It also provides that "it is expressly stipulated, however, that the work of constructing said track and appliances therewith connected shall not be commenced until the said Railway Company, its successors or assigns, shall have completed and ready for operation a continuous line of interurban railway from Hillsboro or Staunton to the limits of said city of Litchfield at some

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point where same connects with the right of way as mentioned in section one of this ordinance."

JETT & KINDER, for appellant; JOHN G. DRENNAN, of counsel.

RINAKER & RINAKER and J. H. ATTERBURY, for appellee; H. J. HAMLIN, of counsel.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

The principal and controlling question presented by this record for determination is as to the proper construction and effect of section 209 of chapter 114 of the statute entitled "An act in relation to the crossing of one railroad by another and to prevent danger to life and property from grade crossings," which reads as follows:

"That hereafter any railroad company desiring to cross with its tracks the main line of another railroad company, shall construct the crossing at such place and in such manner as will not necessarily impede or endanger the travel or transportation upon the railway so crossed. If in any case objection be made to the place or mode of crossing proposed by the company desiring the same, either party may apply to the Board of Railroad and Warehouse Commissioners and it shall be their duty to view the ground and give all parties interested an opportunity to be heard. After full investigation, and with due regard to safety of life and property, said board shall give a decision prescribing the place where and the manner in which said crossing shall be made, but in all cases the compensation to be paid for property actually required for the crossing and all damages resulting therefrom, shall be determined in the manner provided by law in case the parties fail to agree." (Rev. Stat. 1903, Page 1479.)

It is insisted by appellant that under said act, where objection to such crossing is made, a railroad company organized under the general railroad act of this State has no right to cross with its railroad track the main track of another railroad at a particular point selected by the company desir-

ing to cross, unless the Railroad and Warehouse Commission approves the place and manner of the proposed crossing. Appellee, on the contrary, contends that the jurisdiction of the Railroad and Warehouse Commission can only be invoked where the proposed crossing is made in violation of the provisions of such act; that inasmuch as the record shows that the crossing in controversy is constructed "at such place and in such manner as will not necessarily impede or endanger the travel and transportation upon the railway so crossed" the intervention of the Warehouse Commission cannot be invoked. We do not so construe the act in question. Appellee having been organized as a railroad corporation under chapter 114 of the statutes, is subject to all the provisions of the same, and is burdened with the same obligations, restrictions and limitations as other railroad corporations organized under such act, without regard to what motive power is or may be employed in the operation of its trains. *Goddard v. Ry. Co.*, 104 Ill. App., 526; *Malott v. Ry Co.*, 108 Fed. Rep., 313.

The clear purpose of the act, when its title, language, the existing circumstances and contemporaneous conditions, the evil sought to be remedied, its necessity and the general objects sought to be attained are considered, is to require that crossings of this character shall be made at such places and in such manner as will not unnecessarily impede or endanger travel or transportation upon the railroad crossed, and that when the question whether or not a crossing is made or proposed to be made, complies with the statute in this regard, is raised by objection, such question is relegated to the Railroad and Warehouse Commission for its final decision and is not one of fact to be determined by the courts.

We construe the statute as meaning and intending, not that the commission shall indicate a particular place and no other at which the crossing shall be made, but that they shall have discretionary power only to prevent its being made at any place or in such manner as will unnecessarily impede or endanger travel on the existing line. That while, where objection is made, the commission may determine

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whether or not a particular crossing desired will be or is dangerous, in case of an adverse decision, the company seeking to cross still has the right to select another place or manner of crossing which, in case of the consent of the municipality and further objection, must in turn be approved by the commission. In other words, the power conferred upon the commission is in its nature that of veto merely. If this construction be reasonable and warranted, the exclusive power of the municipality over the streets within its corporate limits is not interfered with by the act. Its power to control the location of a railroad and to protect property and persons against injury still remains, no positive power being conferred upon the commission to permit a crossing to be made contrary to the will of the municipal authorities. Nor is the constitutional requirement that the consent of the local authorities of a municipality must first be obtained before the general assembly shall grant the right to construct a street railroad therein, to any extent thereby impinged upon. True it is that the commission may in their discretion, prevent any crossing whatever to be made, within the limits of a municipality, and if such interdictive authority can be said to abridge the exclusive jurisdiction of a city over its streets, conferred by the Cities, Villages, and Towns Act, section 209 must be held, impliedly to repeal or modify such part of such former act as is inconsistent therewith or repugnant thereto. Furthermore, we think that such section may be upheld as an exercise of the inherent power of the State to enact all police laws necessary and proper to secure and protect the life and property of the general public, including not only those who may be resident of a particular municipality, but all who travel upon, or entrust their property to the custody of railroads. To this extent the local police power of municipalities is clearly subordinate to that of the State.

In *Malott v. Ry. Co.*, 108 Fed. Rep., 313, appellee, an electric railroad company organized under the general railroad act, sought to cross its track with that of a railroad of which appellant was receiver. It is there held that sec-

tion 209, *supra*, must be construed as *in pari materia* with sections 18 and 20 of the act of March 1, 1872, which provided generally for the exercise of power of eminent domain by railroads, and as making a valid provision for the modification of procedure under such prior statute, so far as relates to the place and manner of constructing railroad crossings, in the interest of greater safety.

It is insisted that if the foregoing construction be adopted, it will hereafter be practically impossible for electric railways to secure an entrance to any of our cities and villages, that such railway cannot acquire the right to use any street of a city or village for the reason that interested steam railroad companies can easily purchase the refusal of permits from property owners along a street and thereby prevent the use of the street by an electric railway, and that, if before any street can be used, the commissioners must locate the point of crossing for each railway to be crossed, and the electric railway must acquire the frontage signatures, it will mean that the existing monopolies will be preserved, and the public cannot have the transportation facilities demanded by it. In answer to such suggestion, it may be said that if the hypothesis suggested be reasonable, and the powers granted the Railroad and Warehouse Commission are too broad and may be exercised in an arbitrary manner, relief should and must be sought from the General Assembly, and not in the courts.

After the present appeal was perfected, appellee filed a motion in this court to dismiss the same for the reason that, as alleged, appellant, after the entry of the order appealed from, interposed and urged in the Circuit Court a motion to dissolve the injunction. Such motion must be overruled. Facts tending to show a release of errors cannot be considered on a motion to dismiss in the absence of a plea of release of errors. *R. Co. v. Siegel*, 161 Ill., 638; *Crosby v. Kiest*, 135 Ill., 458; *Trustees v. Hihler*, 85 Ill., 409.

The foregoing views render a determination of the other questions raised and argued by appellant unnecessary. The interlocutory order granting the injunction will be reversed

and the cause remanded to the City Court with directions to dismiss the present bill for want of equity.

Reversed and remanded with directions.

Chicago & Alton Railway Company v. J. M. Gwin.

1. PASSENGER—*when expulsion from train unlawful.* Held, from the facts in this case, that the expulsion of the passenger was unlawful.

Action in case. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

KERRICK & BRACKEN, for appellant; F. S. WINSTON, of counsel.

LIVINGSTON & BACH, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in case by appellee against appellant for the recovery of damages resulting from the alleged unlawful ejection of appellee from one of appellant's trains and for false arrest. A trial of the cause by jury resulted in a judgment in favor of the plaintiff for the sum of \$500, to reverse which the defendant appeals.

The declaration avers that on August 28, 1904, plaintiff purchased a first-class ticket over defendant's railroad from Chicago to St. Louis; that on said date he boarded one of its regular trains at Chicago and delivered his ticket to the conductor of said train, who when near Bloomington, demanded that he pay fare from Bloomington to St. Louis; that upon plaintiff's refusal to comply with such demand, the conductor ordered two police officers at Bloomington to

eject plaintiff from the train; that by the direction of the conductor, said officers laid hold of plaintiff and arrested him; that he was unlawfully and wantonly ejected from the train at said point; that upon the train with the conductor was the general passenger agent of defendant, who was present when plaintiff was ejected and knew and acquiesced in the unlawful acts of the conductor; that plaintiff at all times, while on the train, conducted himself in a well-behaved and proper manner; that said ejection was unlawful, wilful and wanton and done to harass and injure plaintiff, etc. In addition to the general issue, two special pleas were filed, demurrers to which were sustained by the court.

The evidence adduced by appellee to sustain the averments of the declaration, tended to establish the following facts: On August 28, 1904, appellee, a resident of Baltimore, Maryland, accompanied by his wife, child and brother, boarded one of appellant's trains at Chicago. Appellee's wife held a regular ticket, and appellee what is called an interchangeable mileage ticket, consisting of a regular ticket to which was attached a passenger's credit check and a conductor's check, upon both of which appeared blank spaces for the signature of appellee, the number of the credential, the amount paid for the ticket, the place of purchase and of destination. When the conductor collected said ticket, after leaving Chicago, appellee signed his name to both checks. The conductor retained the ticket and conductor's check and returned the passenger's credit check to appellee, who replaced the same in his mileage book. At the same time the conductor placed in the band of appellee's hat a card-board check containing the words, "Passengers will please keep this check in sight." After the conductor had left the car, appellee took the check from his hat band and threw the same upon the floor. Shortly before the train reached Joliet, the conductor again demanded appellee's ticket and was informed by appellee that he had given it to him. The conductor then inquired where appellee's hat check was and was told by appellee that he had thrown it away. The conductor then told him that he must pay his

fare again or produce the hat check or some other evidence that he was entitled to passage. Appellee showed him his conductor's receipt for his mileage ticket and the ticket held by his wife. Whereupon the conductor told him that he would be compelled to show his mileage receipt and his wife's ticket at every station, which appellee expressed his willingness to do. A heated altercation then took place between the parties, after which appellee went to the smoker car, where his brother was seated. At every stop of the train thereafter he exhibited his wife's ticket and credentials to the conductor, as he had been requested. After the train left Dwight, when the conductor passed through the smoking car, appellee complained to him of the ill-treatment he claimed he had received and stated that he would report the same to the general passenger agent of the road. The conductor then left the car and upon his return stated to appellee that unless he produced the hat check or paid his fare he would be ejected from the train, to which appellee responded that he had thrown the hat check away and was unable to find it, and again expressed his willingness to show his credentials at every station. Shortly thereafter, George J. Charlton, the general passenger agent of appellant, who was upon the train, came into the car, and inquired what the difficulty was, whereupon appellee exhibited to him his credential book and stated substantially what had occurred. Charlton replied that the hat check must be procured or the fare again paid. When the train arrived at Chenoa, the conductor, at the direction of Charlton, telegraphed to the agent at Bloomington to have police officers at the station when the train arrived. When the train reached that city, two police officers were at the station, who were taken into the car where appellee was sitting, by the conductor, and by him directed to arrest appellee. Appellee stated that he would make no resistance, but would leave the train under protest. After appellee and his wife and child had left the train they were taken toward a patrol wagon which was standing near the platform. Appellee protested against his wife and child being placed in the patrol wagon, whereupon one of the

police officers telephoned to the police station for instructions and was told by the chief of police to do whatever Mr. Charlton directed. The police officers then inquired of Charlton what charge was against appellee and his companions, to which Charlton replied that he did not care to have them taken to the police station, but that he wanted them held until the train had departed. When the train had gone the police officers informed appellee and his family that they were at liberty.

The evidence upon several material points is close and seriously in conflict. Unless the same can be said to be manifestly against the weight of the evidence, it is well settled that it is not our duty to interfere with the findings of the jury upon questions of fact. We have carefully read the record and are unable to say that the jury, who saw and heard the witnesses and are the sole judges of their credibility and the weight to be given to their testimony, were unwarranted in believing appellee's version as to what took place in preference to that of the conductor.

It will be unnecessary for us to consider or determine whether the alleged rule of the company as to hat checks was reasonable, whether appellee had notice of the same, or whether appellee was bound thereby, and in case he disregarded the same, could be legally expelled from the train; for the reason that if the jury found that the conductor told appellee that he would have to exhibit his credentials at each station, and that appellee acquiesced in and complied with such requirement when requested, the right to enforce such rule was thereby waived by appellant's servant, the conductor. It is not controverted that appellee had a ticket or that he delivered the same to the conductor upon demand. The only justification claimed for expelling him from the train was his failure to retain the hat check, as provided by the rule of appellant. If the right to insist upon compliance with such rule was waived, the expulsion of appellee was clearly unjustifiable and unlawful and appellant must respond in damages. Whether appellee was lawfully entitled to remain upon the train or not, the public indignity to which

he was subjected was likewise without justification, either in law or reason. It is not denied that he was arrested without a warrant by uniformed police officers, and unlawfully detained by them at a public railway station in a populous city in the vicinity of a police patrol wagon apparently there for his reception. And this, too, in the presence of his wife and child. The damages assessed seem to us to be inadequate, rather than excessive, as contended.

Appellant complains that the court erred in sustaining the demurrer to its special pleas. The court permitted appellant to introduce full evidence as to many of the facts averred therein. The evidence claimed to have been improperly excluded by the court was in reference to the necessity for, and reasonableness of the so-called hat-band rule, which questions, under the views herein expressed, were immaterial to be considered by the jury. We have examined the instructions carefully and find no error in the rulings of the court thereon, which we consider prejudicial to appellant.

The judgment will accordingly be affirmed.

Affirmed.

Martin Olson v. The People of the State of Illinois.

1. TRIAL—*when errors in conduct of, will not reverse.* Technical errors committed by the judge, which represent the exercise of a judicial discretion, do not afford ground for reversal unless an abuse of discretion is shown and a resulting prejudice.

2. REASONABLE DOUBT—*when instruction as to, does not properly define.* An instruction in a criminal prosecution is improper which requires proof beyond a reasonable doubt of every fact essential to establish guilt.

3. JUDGMENT—*approved form of, in conviction for unlawful sale of liquor and maintaining a nuisance.* In this case a proper form of judgment, where conviction is had upon both branches of such a prosecution, is indicated.

Criminal prosecution for unlawful sale of intoxicants, etc. Error to the Circuit Court of Ford County; the Hon. THOMAS M. HARRIS,

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Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded with directions. Opinion filed March 20, 1906.

C. E. BEACH, for plaintiff in error.

W. H. STEAD, Attorney-General, and L. A. CRANSTON, State's Attorney, for appellee; C. S. SCHNEIDER, of counsel.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Martin Olson, who was indicted and convicted in the Circuit Court of Ford county, brings this case here upon a writ of error. The indictment contained twenty counts. The jury found him guilty upon five counts only; four of them (11, 12, 13 and 14) charged him with the unlawful sale of intoxicating liquors to be drank upon premises adjacent to the premises where sold; and one (the 20th) charged him with maintaining a nuisance.

Motion for a new trial was overruled and exceptions saved, whereupon the court imposed a fine of \$100 upon plaintiff in error and sentenced him to jail for twenty days upon said 20th count; and imposed a fine of \$20 upon each of the said counts 11, 12, 13 and 14, and also sentenced plaintiff in error to jail until the fines and costs assessed upon each of said four counts were paid; and furthermore, directed that the period of confinement under the eleventh count should begin at the expiration of the imprisonment under the twentieth count, and that the period of confinement under the twelfth count should begin when the imprisonment under the eleventh count should end, and so on, fixing confinement upon each count in like manner. Defendant duly excepted to the judgment.

While plaintiff in error says in his motion for new trial that the verdict is contrary to the evidence and argues that matter in this court, it seems to us that the evidence is amply sufficient to warrant the verdict.

Six witnesses testified to sales of intoxicating liquor by plaintiff in error, and those in charge of his business. He was conducting what is called a cold-storage, where he sold

lager beer. About twenty feet from the cold-storage was a barn to which purchasers would carry their beer and there drink it and near by was a pasture controlled by him, in which, also, purchasers after buying from him, would open their beer bottles and drink. Purchasers would leave their empty bottles either in the barn or pasture, where plaintiff in error could gather them up from time to time. In making sale plaintiff in error said, that he did not care where purchasers drank their beer so they got off the place where the sale was made. There was not only sufficient evidence to warrant the jury in returning the verdict they did, but in fact we do not regard the case as close at all upon the evidence.

The contentions made here by plaintiff in error that the court erred in allowing bystanders inside the bar during the trial, that the remarks of the court were prejudicial, that one Mr. Schneider was wrongfully permitted to make an argument in the case, and that the State's attorney was permitted to cross-examine witnesses and read from the notes of the case taken before the grand jury, are all, in our judgment, inconsequential in view of the fact that the guilt of plaintiff in error was so fully shown by the evidence. We do not wish to be understood to say that such matters might not be prejudicial in a case which was close upon the evidence. The control of such matters rests largely in the sound discretion of the court and it is the duty of the trial court to see to it that one charged with an offense should have a fair and impartial trial and that the case should proceed in an orderly and becoming manner and without undue advantage to either side, yet a court of review will not reverse alone upon matters that rest solely in the discretion of the trial court unless that discretion has been abused and the party prejudiced thereby. Such is not the case here.

Plaintiff in error alleges that it was error for the court to refuse his third, fourth and fifth instructions as offered. Such third refused instruction was to the effect that in order to convict, the evidence must show that the sale of liquor was made with the knowledge upon the part of the defendant that

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it was to be drank upon the adjacent premises, or that he consented to the purchaser so drinking. The fifth instruction of plaintiff in error as given by the court states the same proposition in substance and we have no doubt the court refused the one so marked because it was a repetition of the one given.

The fourth instruction of plaintiff in error refused does not state a correct rule of law, as it is not necessary to warrant a conviction to establish each fact necessary to show guilt, beyond a reasonable doubt. The reasonable doubt must relate to the guilt of accused.

The fifth instruction of plaintiff in error was properly refused as argumentative.

There was no error in the giving or refusing of instructions prejudicial to the case of plaintiff in error.

The judgment, however, was incorrect in form and this cause must be reversed for the sole purpose of allowing the State's attorney to move the court to enter judgment in proper form. There should be a fine imposed upon each of the counts numbered 11, 12, 13 and 14, and plaintiff in error ordered to stand committed till such fine and costs are paid; and also a fine upon count numbered 20, with a jail sentence. That much of the judgment as was in excess of the above was error, and for that error alone, the judgment is reversed and the cause remanded with leave to the State's attorney to move for proper judgment.

Judgment reversed and cause remanded with direction to enter proper judgment, in accordance with the views herein expressed.

Reversed and remanded with directions.

Kellyville Coal Company v. Jennie Bruzas.

1. **MINER'S ACT**—*section 18 construed.* The language of this section as follows: "No one shall be allowed to enter the mine, to work therein, *except under the direction of the mine manager* until all conditions shall have been made safe," may not mean that the manager shall stand over the laborer and direct every act he may have to perform, but it does mean that he shall, by reason of his special qualifications required by law, direct and tell a man who is without such qualifications how to do his work.

2. **LOSS OF SUPPORT**—*what evidence competent in action for.* In a suit by a widow to recover under the Miner's Act for loss of support arising from the death of her husband, it is competent to show that she had two minor children.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of Vermillion County; the Hon. JAMES W. CRAIG, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

H. M. STEELY, for appellant.

DANIEL BELASCO and PENWELL & LINDLEY, for appellee;
WALTER C. LINDLEY, of counsel.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Joseph Bruzas, husband of appellee, was killed while working in a coal mine of appellant. Appellee brought suit under the act entitled "Mines and Miners," alleging that appellant was negligent in the management of its mine, by means whereof deceased was killed and plaintiff damaged. A jury returned a verdict in appellee's favor for the sum of \$1,700, upon which the court rendered judgment. The coal company appeals.

The law upon which appellant's liability depends is part of section 18 of chapter 93 of the Revised Statutes and reads as follows: "No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except

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under the direction of the mine manager, until all conditions shall have been made safe."

The evidence shows that the accident occurred early in the morning of May 11, 1904, and that on the night of the 8th of May, the mine examiner of appellant made an examination of the place where deceased was killed and found it was in a dangerous condition, and so marked it; that there was an uneven roof there and it looked as though it might come loose; that this particular entry was in bad shape and was so reported to the pit-boss.

The assistant mine manager was notified of the dangerous condition of the entry before Bruzas was killed, but he did not visit this particular place before the accident. Bruzas in his line of duty, as he understood, and in obedience to the order of the pit-boss or the mine manager to "go ahead and clean the place," went to the dangerous entry in company with others, and while there at work a large rock, described by one witness as "two carloads," fell from the roof of the entry upon Bruzas and killed him.

Appellant contends that the language quoted: "No one shall be allowed to enter the mine to work therein, *except under the direction of the mine manager* until all conditions shall have been made safe," does not mean that the work done, must be done under the *personal supervision* of the mine manager; that the legislature did not intend that the manager should himself, necessarily, go into the mine; nor that where danger is discovered in the roof of an entry that he should go along and stand by the men who were sent to remedy the defect; and reviews at great length the meaning of the word "direction."

We do not think it difficult to find the true meaning of the words employed in the act, when read in the light of all the surroundings. The act itself in which the quoted words are found, is entitled "An act to revise the laws in relation to coal mines and to provide for the health and safety of persons employed therein." So that every section in the act can and must be read in the light of the expression that the lives of persons *employed in mines* should be protected.

Furthermore, the statute upon this subject contemplates that the mine manager shall have special qualifications, which should give him knowledge of the work and its attendant dangers, superior to those which the common laborer may possess. He must pass an examination and possess a license from the State Board, after having furnished satisfactory evidence of his experience and competency in coal mining matters. These requirements, which are all enacted in the interest of the safety of persons in coal mines, suggest that the mine manager under whom men are to work when conditions are not safe, should discharge a peculiar and an exacting duty.

On the night in question and at about one o'clock A. M. the boss or manager, who knew of the dangerous condition of the entry, said to Bruzas and others of his gang: "Go ahead and clean the rock, clean the place," without going with the men or directing them how or in what manner they should proceed to make the dangerous spot safe; pursuant to which order deceased entered upon the work and was killed.

We do not believe that such a command was the *direction* which the statute contemplated. In what way did such an order give Bruzas the benefit of the mine manager's superior knowledge and more extended experience? What benefit did the laborer derive from the capabilities which the manager gave evidence of when he was licensed by the State to manage a mine? None at all. Such an order could have been given by a man who had never been in, or seen, a mine. It was an order to *accomplish* a work, not directing *how* or in *what* manner to do it. It may be that the law involved does not mean that the manager shall stand over the laborer and direct each act he may have to perform, but certainly it does mean that he shall, by reason of his special qualifications, direct and tell the man who is without those qualifications, how to do the work. If the manager is so familiar with the danger that he can give direction, such as the exigencies of the case may require, without going in person to the point of the danger, we see no good reason why he cannot do so, but if, upon the other hand, he must go to the spot

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in order to give such directions as will protect the lives of men who obey his order, then he must do that. The man who goes to a place of danger to do work under the order of the manager is entitled to the benefit of the manager's superior qualifications as to the manner of doing the work and the means to be employed.

Appellant contends that the particular section involved has no application to the case of deceased, because he belonged to what is called the *rock gang*, i. e., a gang of men who are employed in making the mine and entries safe; that the law has application only to miners, diggers and drivers, i. e., the producers of coal. This seems to us to be a very narrow and strained construction of the statute. Deceased was a common laborer working under express orders, not having any special qualifications beyond those who dug coal or drove a mule, and it cannot be seriously argued that one common laborer in a mine shall have the benefit or protection of this law, while it shall be denied to another. The title of the act declares it to have been enacted in the interest of *persons employed* in coal mines, and not in the interest of any particular class of such laborers. As shown by the evidence deceased had worked in the mine only a short time before he was killed, and had not recently before his death been in that part of the mine where the dangerous condition existed; nor was any instruction given to him on the night in question concerning the dangerous condition of the roof of the entry where he was killed. Although the assistant mine manager knew of that condition, he, without visiting the reported dangerous spot to determine just what its needs might be, sent Bruzas and his gang there to work, without the benefit of that superior skill and experience which, under the statute, the manager was required to possess and employ in the protection of life.

There is some conflict in the evidence as to what deceased was doing at the time he was killed, but there can be no doubt that he was trying to do, without direction, what, perhaps, he would never have attempted if his labors had been guided by that superior knowledge and experience which

the mine manager possessed, and to which the law clearly contemplates deceased was entitled. We think the evidence clearly warrants the verdict against the appellant for the negligence charged against it in the fourth and also in the additional counts of the declaration, where the charge is expressly made that Bruzas was ordered and permitted to work without being under the direction of the mine manager.

Appellant contends that the court was in error in allowing appellee to testify that she had two children, but we do not think there is any merit in the claim. In the case of *Beard v. Skeldon*, 113 Ill., 584, which was a suit by a widow under this same statute to recover for the death of her husband, the trial court instructed the jury that in making their estimate of damages they could take into consideration whether or not deceased left any children surviving him and the court then said: "The statute, in our opinion, authorizes but one action; but one recovery for the entire loss. If the deceased leaves a widow she is entitled to sue and recover for the loss, whatever it may be." That to require three actions to be brought by three different parties for one and the same cause of action would be productive of useless expense and it was therefore not error to give the instruction. This decision was referred to with approval in the case of *Consolidated Coal Co. v. Maehl*, 130 Ill., 551-556, and in *Willis Coal and Mining Co. v. Grizzell*, 198 Ill., 313.

Appellant criticises the action of the court in giving appellee's second instruction, which told the jury that "If under the evidence and instruction of the court they found defendant guilty, then in assessing damages they should assess same with reference to the pecuniary loss sustained by the wife," etc. We do not see how this instruction could have misled the jury. It did not direct a verdict; but, in substance, told the jurors, that if upon the evidence and under the instructions they found the issues for the plaintiff, what matters they could take into account in fixing her damages. In this respect the instruction in question differs materially from the one in *Kranz v. Thieben*, 15 Ill. App., 482, referred to by appellant.

Drake & Hostetler v. Lux.

Appellant's tenth, eleventh, twelfth, thirteenth and fourteenth instructions as offered were properly refused by the court, as they stated propositions of law not consistent with the interpretation of the statute involved, as herein expressed.

The instructions as given were not misleading, but fairly stated the law applicable to the case. The other assignments of error are not of enough importance and merit to warrant further discussion of the case.

There is no reversible error in the record and the judgment of the Circuit Court is affirmed.

Affirmed.

Drake & Hostetler v. A. W. Lux, Administrator.

A. W. Lux, Administrator, v. Drake & Hostetler.

1. *APPEAL—when should be taken from the county to the circuit court.* An appeal from a judgment of the county court allowing or disallowing a claim against an estate, is required to be taken to the circuit and not to the appellate court.

Proceeding in court of probate. Appeals from the Circuit Court of Moultrie County; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

EDEN & MARTIN, for Drake & Hostetler.

E. J. MILLER, for A. W. Lux, Administrator.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Drake & Hostetler presented two claims in the County Court of Moultrie county against the estate of Minerva Brown, deceased; one was upon a note for \$800 dated April 29, 1895, due in three years, with interest at seven per cent. which note was signed by said Minerva Brown and C. W. Brown, her husband; the other of said claims was upon two notes, each dated April 30, 1896, one for the sum of \$986.62 due in one day from its date, signed by C. W. Brown and by

Brown and Company (which said firm was alleged to be composed of deceased and C. W. Brown), and the other for the sum of \$4,035 due in one year from its date, signed by the same parties, each drawing interest at seven per cent. per annum. The claims were heard in the County Court and such proceedings had that an appeal was taken to the Circuit Court of that county, where the two claims were heard together by the court, without a jury, the first claim being known as No. 5868 and the second as No. 5869.

Upon the trial of the causes, so heard together, the Circuit Court found the issues in said No. 5868 in favor of the estate and entered judgment against the claimants for costs, from which judgment the claimants have appealed; and in No. 5869 the Circuit Court found the issues in favor of the claimants and against the estate in the sum of \$586.23, from which judgment the estate has appealed. The two cases are here heard together upon appeal upon one bill of exceptions.

It appears from the evidence that C. W. Brown, husband of deceased, who was engaged in the grain business, began doing business about the year 1886 with the banking firm of Drake & Smith. During a part of the time, at least, he used the name of Brown and Company, of which firm deceased was, it is claimed, a member. Brown began borrowing money at the bank of Drake & Smith to use in his business and claims that the contract to loan then made, and which has been carried along through the business of many years following, was an agreement to pay one per cent. a month to the bank for the use of the money and was therefore usurious.

The claimants deny the charge of usury and attempt to explain, by a system of averages, that the rate of interest upon overdrafts would have been only seven per cent. or a fraction less. We feel constrained to hold, however, that the trial court committed no error in finding that usury was contracted for and paid upon the loan.

Mr. Brown testified that when he first opened the account with Drake & Smith that he agreed to pay one per cent. a

month for the use of the money and the written statements made by the bank and introduced in evidence tend to corroborate Mr. Brown in his contention, for they show clearly that at the end of each month in many instances the monthly balance was taken as the basis of an interest charge and the interest extended for the month, at one per cent. Furthermore Drake himself testified that "I did make that charge of one per cent. of what his (Brown's) balance would be on the last day of the month as an inducement to keep his balances down."

We fail to see in what way an effort on the part of the bank to induce Brown to keep his balance down tends to disprove the charge of usury, and hold that there was sufficient evidence to fully warrant the finding that the contract as first entered into was an agreement to pay interest at one per cent. a month, and that such rate of interest was never changed, but continued through the entire time of the loan from its inception.

Mr. Brown first opened the account at the bank in the year 1886, with Drake & Smith, and continued to do business with that firm until Smith was succeeded in the business by one Dyer in 1888. The business was then continued with the firm of Drake & Dyer until the year 1890, when the firm was changed by Dyer going out and Hostetler and son coming in, after which time the firm was known as Drake, Hostetler & Son. It so remained until the death of the elder Mr. Hostetler, when the firm name was changed to Drake & Hostetler. We hold that the loan, so far as claim No. 5869 is concerned, is one continuous transaction from its beginning with Drake & Smith, through all of the dealings therewith by the different firms, and that each succeeding firm has accepted the account chargeable with notice of the claim of usury. Drake, who was a member of the first firm which made the loan, has been a member of each succeeding firm and the senior member of the present firm which presents the accounts, and notice to him of the claim of usury would be notice to each of the firms. The books of the firm, so far as they appear in evidence, also seem to have been

kept in a manner to give notice to a purchaser of the bank's business, of the claim now made that usury was involved in the loan, and purchasers of the bank's business must be held to have accepted the account subject to that infirmity.

We think the trial court was in error in holding that there was usury involved in the \$800 loan, which is the basis of the claim in No. 5868. The note of \$800 was given by deceased and Brown as a credit upon the general account which Brown was then running at the bank in the name of Brown & Company. The evidence seems to show conclusively that at the time the note for \$800 was given that Brown & Company owed the bank between \$4,000 and \$5,000. C. W. Brown does not seriously contend that at that time the indebtedness was not over \$4,000 and says he cannot say but that it was over \$5,000.

There is no evidence offered to show that on April 29, 1895, the greater portion of the sum due from Brown & Company to the bank was not for principal. Counsel for deceased do not claim that all usury involved exceeds the sum of \$3,076, so the conclusion is irresistible that on the day the \$800 note was made and credited there was due from Brown & Company as *principal* to the bank a sum greatly in excess of \$800. That being true then the credit arising from the giving of that note could well have been applied to such principal indebtedness. Since no directions are shown to have been given as to the application of the credit, it must be presumed to have been applied upon that part of the indebtedness that would be legal and collectible. It then being presumed that such note was applied upon the valid indebtedness, *i. e.*, the principal, and since that note itself drew a legal rate of interest (seven per cent.), it follows that recovery upon that claim for full amount of the note and interest should have been had.

Counsel for the estate of Minerva Brown made a motion in the Circuit Court to dismiss the appeals in that court upon the ground that the appeals from the decision of the County Court should have been taken direct to this court, which mo-

tion the Circuit Court overruled. Upon which action of the court error is assigned.

There was no error in such ruling. This matter was very fully discussed by Judge Bailey in the case of Greir v. Cable, 159 Ill., 29, where it was held after a careful review of the different acts governing appeals from the County Court, that appeals from judgments of the County Court allowing or disallowing claims against estates are required to be taken to the Circuit Court and not to the Appellate Court, and that such a proceeding is not a suit or proceeding at law or in chancery within the meaning of the Appellate Court Act relating to appeals. The same doctrine was announced in Lynn v. Lynn, 160 Ill., 307-315.

The holding announced in those cases is in no way disturbed or qualified by the cases cited by counsel for the estate, viz.: Starrett v. Brosseau, 208 Ill., 408, and Sellers v. Thomas, 185 Ill., 384. In the former case the question as to which court the appeal should have been taken was in no way discussed at all, while as a matter of fact the appeal was taken to the Circuit Court and the cause there re-tried. The latter case, above referred to, was a proceeding instituted in the County Court for the trial of right of property and had no connection at all with an estate, and was, therefore, a suit at law in that court from which an appeal would lie to the Appellate Court under the Appellate Court Act relating to appeals, as clearly explained in Greir v. Cable, *supra*.

While the evidence strongly tends to show that deceased was a member of the firm of Brown & Company, we do not find it necessary to express any holding upon that proposition, which is purely one of fact, and a re-trial of the case by the Circuit Court may render such determination wholly unnecessary, since counsel for the estate strongly contend that the evidence fully shows that the amount of usury involved from first to last on the general indebtedness represented by claim No. 5869 is \$3,076, which, with payments of \$2,884.73, aggregate a sum of \$5,960.73, to liquidate the sum of \$5,821.62.

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The judgment of the Circuit Court upon the claim involved in No. 5868 is reversed and the cause remanded.

In No. 5869 the Circuit Court should have credited the bank with only such sums of money, or its equivalent, as were paid to Brown, or Brown & Company, allowing claimants no interest, and charging them with all payments made upon the account, including said \$800 note (No. 5868). Such statement to begin with the inception of the account under Drake & Smith.

The case is accordingly also reversed and remanded that such action may be taken by the Circuit Court as comports with the views herein expressed.

Reversed and remanded.

Martin & Johnson v. Trainer & Bramblett.

1. JOINT LIABILITY—*may be denied under general issue.* Joint liability may be denied in an action of assumpsit under the plea of the general issue, even though unverified; the effect of verification is simply to cast the burden of proving the joint liability upon plaintiff.

2. CONTRACT—*when party who has signed in blank may dispute written terms of.* A party who has signed a contract in blank may dispute the terms as written above his signature as against the party who wrote such terms.

Action of assumpsit. Appeal from the Circuit Court of Christian County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

J. C. and W. B. McBRIDE, for appellants.

HOGAN & WALLACE, for appellees.

MR. JUSTICE RAMSAY delivered the opinion of the court.

This was a suit brought by Trainer & Bramblett, appellees, in the Circuit Court of Christian county, against Martin & Johnson, appellants, to recover a commission alleged to be due appellees upon a sale of a piece of land near Morrison-

ville. A jury returned a verdict in favor of appellees, upon which judgment was rendered. Martin & Johnson appeal.

It appears from the evidence that Mr. Bramblett, one of the appellees (partners in the real estate business), went with one Mr. Hull to the place of business of appellants in Morrisonville under an alleged contract or agreement that if the appellees sold the land to Hull for over \$100 per acre they should have from appellants as commission one-half of all that said land sold for over \$100 per acre. Appellees claim that while Bramblett was there, a contract in writing was closed for the sale of the land in question, by the terms of which Johnson agreed to sell and convey the land to said Hull for the sum of \$21,630, upon the making of which contract appellees contend that their commission was fully earned, and they accordingly brought suit.

Johnson, on behalf of appellants, claims that when Hull and Bramblett came to him in Morrisonville, that he said to both of said parties that he had only a verbal agreement with one Mr. Mitchell to buy from him the land in question and that if Mitchell would convey the land to him as he, Mitchell, had agreed, Johnson would then sell and convey to Hull at the price then fixed; that Bramblett was very anxious to get a contract in writing made and signed; and Johnson, upon Bramblett's proposal, signed a contract in blank (as he, Johnson, at that time was desirous of driving out in the country to see Mitchell), leaving the contract in blank in Bramblett's hands to be filled up according to the agreement; and that Bramblett wrote the contract over the signature of Johnson and *omitted* to incorporate in the written contract the condition that the sale and contract should be inoperative if Mitchell refused to make a deed; that after filling said blank, Bramblett had Hull sign the contract and took it away with him, treating it as a completed contract; that Mitchell did in fact refuse to carry out his verbal agreement and he, Johnson, was therefore unable to sell and convey to Hull, and for that reason no commission had been earned.

A review of the evidence shows clearly that appellant Martin had nothing to do with the alleged contract of sale in-

volved. Mitchell, who owned the land, testified that his contract or agreement was with Johnson alone, and the talk upon the part of both appellees, so far as it related to the sale, was with Johnson, the contract in writing was signed by Johnson individually, while both Martin and Johnson testified that Martin had nothing, whatever, to do with the matter, but expressly declined to go into the transaction.

There is nothing in the record to dispute or qualify this evidence, except the fact that appellants are partners in a bank, and the verdict finding Martin to be liable jointly with Johnson in the transaction involved is manifestly against the weight of the evidence. Appellees contend, however, that as appellants filed a plea of general issue only, and did not file a verified plea denying partnership they cannot be heard to deny joint liability, and rely upon section 36 of the Practice Act which provides that in actions upon contracts against two or more defendants as partners, or joint obligors, whether so alleged or not, proof of the joint liability or partnership of the defendants shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability or the execution of the instrument sued upon, verified by affidavit.

We think the only construction which can reasonably be put upon this statute under the authorities is that if defendants seek to throw upon the plaintiffs the burden of showing a joint liability of defendants *in the first instance*, then the issue must be presented by a plea in abatement or a plea in bar verified.

In the case of *Davison v. Hull*, 1 Ill., App. 70, it was held that section 36, now under discussion, did not require the filing of a plea denying joint liability, verified, when it affirmatively appears that parties are made defendants against whom no joint cause of action is shown. In the case of *Kennedy v. Hall*, 68 Ill., 165, defendant filed a plea of *non assumpsit* only, verified and it was held to put in issue the fact of partnership and to impose upon the plaintiff

the *onus* of making out his case. It would seem to be a fair inference from that decision that if the affidavit under that plea put the burden upon the plaintiff, the plea itself would permit defendants to show a want of partnership if they were willing to assume the burden of proof upon that issue.

This section of the statute, in our judgment, was not intended to deprive a defendant of his common-law right to show affirmatively under the general issue a want of joint liability, but to give him the right, by verifying his plea, to compel plaintiff to assume the *onus* and show joint liability in the first instance. *Bensley v. Brockway*, 27 Ill. App., 410; *Donnan v. Bang*, 3 Ill. App., 400; *Rosenberg v. Barrett*, 2 Ill. App., 386. In the *Bensley v. Brockway* case, *supra*, the only plea filed was *non assumpsit* and the court held that under that plea alone defendants were at liberty to disprove joint liability.

Appellants also assign as error the giving of appellees' instructions, but it will be necessary for us to review only the seventh instruction as it was so palpably wrong as to make a reversal necessary.

That instruction told the jury: "That a person who can read and write, negligently signing a contract in blank and directing some one to fill out the same for him, is bound by the terms placed therein and cannot avoid the same because it is different from what he intended."

This instruction was misleading in directing the attention of the jury to any alleged negligence on the part of Johnson in signing the blank with which Bramblett was entrusted and which he filled up over Johnson's signature. The doctrine of negligence invoked has relation to obligations that may get into the hands of some innocent purchaser, but cannot be invoked by one who has by any device written, in blanks, in a contract that which he should not have written there, or omitted to write something which he should have written. *La Salle Pressed Brick Co. v. Coe*, 65 Ill. App., 619. Furthermore there can be no possible negligence imputed to Mr. Martin as he never signed the con-

tract, and, so far as the evidence shows, was in no way a party to it.

Besides that, such instruction is misleading in giving special emphasis to such written instrument, as appellants, so far as Trainer & Bramblett are concerned, are not estopped or bound by the recitals in such written agreement, for the reason that appellees were not parties to it; but appellants are permitted to show the true or actual contract existing between the parties. Amer. & Eng. Encyclopedia, 2nd ed., vol. 21, page 1103; Elliott on Evidence, vol. 1, sec. 572; Coleman v. Pike Co., 3 Amer. State Rep., 746; C., S. & St. L. R. R. Co. v. Beach, 29 Ill. App., 157. The instruction as given stated a rule that had no proper place in the trial of the cause, and is open to the further objection that it states a mere abstract proposition of law.

For the reasons above stated the judgment is reversed and the cause remanded.

Reversed and remanded.

Town of Normal v. Mary L. Bright.

1. CONTRIBUTORY NEGLIGENCE—*what does not establish, in action for personal injuries arising from a defective sidewalk.* The existence of another route does not establish contributory negligence; such fact may go to the jury who are entitled to consider it in determining the question whether the plaintiff was guilty of contributory negligence.

2. REPAIRS—*when offer of evidence of, made after accident, not ground for reversal.* An attempt to show that the sidewalk in question was repaired after the accident sued upon is not ground for reversal where neither bad faith nor prejudice appears.

Action on the case for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

HART & FLEMING, for appellant.

Town of Normal v. Bright.

LILLARD & WILLIAMS, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Mary L. Bright, the appellee, brought suit against the town of Normal to recover damages resulting to her from a personal injury alleged to have been sustained by reason of a defective street crossing in the town of Normal. The jury returned a verdict in appellee's favor in the sum of \$1,350 upon which the court rendered a judgment. The town appeals.

The injury complained of happened to appellee while she was attempting, as alleged, to cross a ditch or waterway in what is called Linden street in the said town, to reach the west side of said street, which intersects Lincoln street at that point. The ditch was in, and near the west side of Linden street and ran north and south. Over it was a crossing of one or two planks or boards lying unfastened at the ends upon which it is claimed appellee attempted to cross when she fell and was injured.

It appears from the evidence that appellee, in company with her husband, and some friends, was crossing said street intersection diagonally from northeast to southwest in order to catch a street car to her home; that it was dark and stormy and the street and crossing muddy. That the crossing was a poor one and in bad condition and that appellee was permanently injured, appellant does not seriously dispute, but seeks to escape liability upon other grounds.

Appellant first argues, and at great length, that the evidence does not show that appellee fell while she was on the crossing; but that she slipped in the mud before she got to the crossing and fell in the ditch. This contention relates solely to a question of fact which was one for the jury to decide. An inspection of the record shows that appellee testified in substance that "We started across and that was where I fell * * * There was a little board or a sidewalk, or a plank or a board * * * I went to go across and my left foot slipped and went in the ditch; my knee

struck a board or plank across the ditch." This testimony of appellee was in no way disputed and tends strongly to show that appellee was *upon* the crossing when she fell. She is also corroborated by the testimony of her husband who stated that his wife's knee was hurt. "It was bruised in the knee cap on the inside, I think it was." This bruise on the inside of the knee tends to show that appellee slipped in the manner she described and hurt the knee in the fall. We think the jury were fully warranted in finding that appellee suffered the injury from the fall *while* she was on the crossing and attempting to pass over it.

Appellant next contends that appellee failed to show by a preponderance of the evidence that the town authorities had any notice that the crossing was dangerous. Upon this question there was a conflict in the evidence. Appellee was hurt in July, 1904. William Bright testified that in March or April, before he notified Yazel, the street commissioner of the town of Normal, of the dangerous condition of the crossing and while Yazel emphatically denies any such conversation, it appears from his own testimony that he knew of the condition of the crossing, for he says: "There was no plank crossing there, only across the ditches at the place where the accident happened. The board on the east side had no bearing to it. It was over a ditch; the ditch was three or three and a half feet wide; the ditch was made by a road grader." Yazel had been street commissioner of the town ever since 1897, with the exception of the year 1902, and from what he testified to, seems to have had a fair understanding of the true situation at the place of the accident. Certainly we cannot say upon that question that the verdict is against the manifest weight of the evidence.

Appellant's assignment of error that appellee was not in the exercise of due care at the time of the injury does not seem to us to be sustained by the evidence. The night was dark and threatening; the lights, if any, were very uncertain; the street muddy and wet; the crossing was one which appellee had a right to use; and it was fairly a question for

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the jury to say whether or not appellee was in the exercise of due care for her own safety. The record discloses no evidence that appellee was careless or negligent; but upon the contrary it would seem that she did what any person of ordinary caution would in all likelihood have done under the same circumstances.

There is no force in the claim of appellant that it was the duty of appellee to travel or go by some route other than the one she took and that her failure to do so was negligence upon her part. It was competent for appellant to show upon the trial that there was another route and that appellee knew of the dangerous or unsafe condition, if true, of the route she took, and knowledge of such condition upon her part and proof of such other route were both circumstances which the jury had a right to consider in determining whether or not appellee was in the exercise of due care; that rule, however, extends no farther than that and leaves the question of due care for the jury to determine under all the evidence. *City of Sandwich v. Dolan*, 133 Ill., 177.

Appellee testified that she did not know anything about the condition of the crossing: "Never paid any attention to it; I hardly ever went over it. Don't remember whether I was over it before or not."

Under the authority above cited, these circumstances were proper for the jury to consider and weigh. They have found that there was no want of due care upon the part of appellee and we do not feel disposed to disturb the verdict upon that ground.

Appellant next contends that this cause should be reversed because appellee persisted in getting before the jury the fact that the town had put in a new crossing at the place in question after the accident to appellee. The practice criticised cannot be too severely condemned, when engaged in for the purpose of influencing the jury, and we would not hesitate to reverse this cause upon that ground if we thought such had been the result; but upon an inspection of the record itself we do not think that the action complained of was so wrongful as to warrant a reversal.

When the question and answer were first made the court sustained an objection to the question and excluded the answer. After the purpose of the offer was stated by appellee the court again sustained the objection and required appellee to state any further claim along that line to the court out of the hearing of the jury. The court seems to have acted fairly in the matter and his action in this respect seems to have been intended to keep from the jury any prejudice that appellant may have thought appellee's conduct was intended to produce. Furthermore, the court, in its first instruction given for defendant, told the jury that in determining whether or not appellant was negligent, they should not consider the fact (if it be a fact) that appellant had repaired the crossing after the injury.

Appellant has criticised at great length the action of the trial court, in the giving of each and every instruction read to the jury for appellee, and in the refusal of twelve instructions offered by appellant. The court gave eight instructions for appellee and six for appellant which fully covered every question of law in the case.

We have fully and carefully considered the objections of appellant and are led to conclude that there was no error in the action of the court in the refusal of instructions and that the fourteen instructions given, as a series, stated the law governing the case fairly and with substantial accuracy.

There is no prejudicial error in this record and the judgment is affirmed.

Affirmed.

William C. Snyder, et al., v. Eugene B. Baker, et al.

1. **FREEHOLD**—*when involved.* Where a perpetual easement is in issue, a freehold is involved and the Appellate Court is without jurisdiction.

Injunctional proceeding. Appeal from the Circuit Court of Platt County; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1905. Appeal dismissed. Opinion filed March 20, 1906.

Baker v. Duddleson.

W. R. DAVIDSON and W. G. CLOYD, for appellants.

REED & REED and ECKHART & MOORE, for appellees.

MR. JUSTICE RAMSAY delivered the opinion of the court.

This was a proceeding instituted by appellees against appellants, the primary object of which was to compel appellants to remove some obstructions from ditches upon and across their own lands and to restore to appellees the right of the free flow of water through said ditches.

The bill was framed and the cause tried and is argued in this court upon the theory that the appellees had a permanent right to have the waters from their lands flow through ditches over the lands of appellants.

Such a right, if established, is a perpetual easement (a freehold), and this court is without jurisdiction, as the appeal should have been taken to the Supreme Court. *Wessels v. Colebank*, 174 Ill., 618.

The appeal is dismissed.

Appeal dismissed.

Zion F. Baker v. D. M. Duddleson, et al.

1. *SHERIFF—when may demand indemnifying bond.* Where there is a reasonable doubt as to the ownership of the property sought to be levied upon, the sheriff may require an indemnifying bond.

2. *EXECUTION—effect of failure to furnish indemnifying bond upon lien of.* The failure or refusal of the plaintiff in an execution to furnish to the sheriff upon demand an indemnifying bond, will operate to postpone the lien of such execution to one junior thereto in point of time upon which a levy has been made and upon which indemnity has been given.

Judgment by confession. Appeal from the Circuit Court of Moultrie County; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

E. J. MILLER and MILES A. MATTOX, for appellant.

JOHN E. JENNINGS, for appellees.

MR. JUSTICE RAMSAY delivered the opinion of the court.

On the 22nd day of November, 1904, an execution in favor of Duddleson Brothers, the appellees, against one William Williamson for the sum of \$108.18 was issued from the County Court of Macon County and delivered to the sheriff of Moultrie County which was received by him and so indorsed at 9 o'clock A. M.

On the same day appellant, Zion F. Baker, had issued from the Moultrie County Circuit Court an execution in his favor for the sum of \$410.45 and against the same defendant, which execution was received and so indorsed by the sheriff of Moultrie County at 11 o'clock A. M., just two hours after he had received the writ in favor of appellees. Sale of property was made and the sheriff retained \$130 which he held until it should be determined which one of the parties to this suit was entitled to the money. Each party entered a motion for a rule upon the sheriff to pay the money to such party, and the matter was heard by the court upon such motions and evidence taken upon the hearing. The court directed the money paid to appellees, to which order appellant excepted and took this appeal.

Several errors have been assigned; but in the view we take of the case it is only necessary to discuss one of them, for our holding upon that subject is decisive of the controversy.

It appears from the evidence that at the time the sheriff received the two executions in question one J. E. Dazey claimed the only property upon which a levy could be made, by virtue of a chattel mortgage made by the debtor, Williamson, to said Dazey.

It was apprehended that litigation was to follow the levy, because of such claim of Dazey and the sheriff required an indemnifying bond before he would levy either execution upon the property of Williamson.

Appellees contend that no indemnifying bond was necessary in the case and that they were not notified that any

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bond was required by the sheriff and that no demand was made upon them to furnish such bond; but we think that in both such contentions appellees are in error. John F. Wright, the sheriff, testified that he received the Duddleson execution from A. T. Summers, an attorney at Decatur, and Arthur Wright, the deputy sheriff, testified in substance as follows: "We required an indemnifying bond before levying upon either of the executions. We notified A. T. Summers the attorney for Duddleson about requiring an indemnifying bond before levying. I did not levy the Duddleson execution on account of not having any bond. Baker gave us the bond required and we did nothing until the bond was given." This is practically all of the testimony upon that subject. The only reasonable deduction to be drawn from the evidence is that appellant did furnish the bond as required by the sheriff, while the appellees did not furnish any bond after they were requested to do so; that by reason of Baker's giving the bond, litigation following the levy resulted in favor of the levying creditor; and thus the sole question is whether he is not by his diligence entitled to priority over the creditor who declined or failed to give the bond.

Our statute in relation to the subject of indemnifying officers is as follows: "If there is a reasonable doubt as to the ownership of the goods or as to their liability to be taken on the execution, the officer may require sufficient security to indemnify him for taking them." Chap. 77, sec. 43.

This section is identical with the statute of Massachusetts upon this subject and in that State it has been held that: "Where there is any reasonable ground to induce an officer to believe that in seizing upon execution, he may mistake and expose himself to an action for damages, by seizing goods not the property of the debtor he may insist on the creditors showing him the debtor's goods, and also on being indemnified for any mistake he may make in conforming to the creditor's direction." *Bond v. Ward*, 7 Mass., 123.

Murfree, in his work on Sheriffs, announces the rule upon this question in the following language: "From the

principle that the indemnity and the like proceedings are exclusively for the protection of the sheriff, it would seem to follow that those creditors only who contribute to his security are entitled to share in the results. Thus where there were several execution creditors, some of whom joined in the indemnity and others refused to do so, it was held that those creditors who had incurred liability by furnishing the indemnity were entitled to the benefit of the levy and that those who declined to do so were estopped from claiming the proceeds of the sale, although their liens were prior to those of the creditors who did indemnify the sheriff. One creditor, it was said, cannot be permitted to make a cat's paw of another." Murfree on Sheriffs, sec. 616.

Freeman, in his work on Executions, announces the same rule in substance. Freeman on Executions, sec. 207.

In the case of Smith v. Osgood et al., 46 N. H., 178, where this subject is discussed, the court hold that: "If there are several creditors, some of whom indemnify the officer when requested, and others who do not, the officer will sell the property, the title to which is thus in dispute, upon the writs of those creditors only who gave the indemnity."

"Those creditors who refused to give the indemnity will be estopped from claiming the avails of such property, even though their writs were prior to those where the property had been applied."

The same doctrine was announced in the case of Smith v. Cicotte, 11 Mich., 383.

The application of this rule determines the rights of the parties in this cause.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Kelly v. Kuntz.

Samuel P. Kelly v. Frederick Kuntz.

1. VERDICT—*when set aside as against the evidence.* A verdict which is manifestly against the preponderance of the evidence will be set aside on appeal.

Action of assumpsit. Appeal from the Circuit Court of Ford County; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

D. D. DONAHUE and LOUIS FITZ HENRY, for appellant.

SCHNEIDER & SCHNEIDER, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Appellee, Frederick Kuntz, on the 8th day of May, 1902, delivered to one D. M. Carson 1,050 bushels and 50 pounds of corn which was put into the elevator of Carson at Clarence, Illinois, as the property of Kuntz. Afterward, and on the 24th day of May, Kuntz went to Kelly, the appellant, a grain buyer in the same town, and entered into a contract with Kelly to sell him about 1,600 bushels of corn which he, appellee, then had upon his farm near Clarence, and also the corn stored in the elevator at Carson, at sixty cents per bushel.

Afterward appellee began delivering the corn from his farm and completed such delivery on the 18th day of June, at which time he received payment in full for the corn, including that in Carson's elevator, and then said to Kelly that the corn in the elevator was the same as the corn he had delivered to Kelly except in color.

At the time of the settlement on June 18th, when appellee received payment in full for the corn at the price agreed upon, he gave appellant an order in writing, addressed to Carson to deliver to Kelly 1,050 bushels and 50 pounds of corn "delivered to you by me," "same quality and in as good shape as I delivered to you."

About that date appellant went to Carson and Carson re-

fused to deliver the corn to appellant unless his loading charges were paid. Thereupon Kelly sent word to Kuntz of the situation and on the 26th of June Kuntz went to Carson and paid the loading charges (\$5.25) and on the 28th day of June, when Carson put the corn in a car furnished by Kelly, it was found to be in bad condition, heated and partly spoiled, whereupon Kelly refused to accept the corn and demanded a return of the money paid for such corn stored in Carson's elevator, which payment Kuntz refused to make and appellant brought suit. There was a verdict and judgment in favor of appellee in the Circuit Court and Kelly appealed.

We have given the evidence in this case a careful examination and are fully satisfied that the verdict is against the manifest weight of the evidence.

While the contract between Kelly and Kuntz was made on the 24th day of May for all the corn at sixty cents per bushel, there was no actual sale accomplished until June 18th, when appellee had drawn and delivered to appellant the corn from his farm and made the order upon Carson for the corn stored in his elevator. There is no evidence at all, that appellant knew that Carson had any loading charges against the stored corn, nor that he was ever informed of such a claim upon the part of Carson until about the 18th day of June. Under the terms of the contract it seems indisputable that Kelly was to have the corn delivered to him free of charge. The order of June 18th, which appellee gave upon Carson was: "*Please deliver to S. Kelly,*" etc. Appellant had paid Kuntz for the corn and was entitled to receive it free from charge and in the condition in which it was agreed to be delivered; and that the corn was in good condition when delivered to Carson is not disputed.

Within a very few days after June 18th, and within two days after Kuntz had paid the loading charges, Kelly provided a car to receive the corn. Carson then loaded corn into the car which, upon inspection, was found to be in very bad condition and Kelly rightfully refused to accept it. That the corn, when delivered in the car, was partly rotten,

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black and heated, is not disputed, while the evidence tends strongly to show that the corn put in the car was not the corn at all of appellee. Three witnesses, Kelly, Barnes and Stevens, testified that at the car, while they were examining the corn in dispute, Kuntz said he did not blame Kelly for refusing to receive the corn and that the corn in the car was not the corn he had delivered to Carson. Kuntz himself, in his testimony, admits in substance that the corn he saw in the car was not the corn he raised on his farm and hauled to Carson's elevator.

Carson testified that he used about three hundred to four hundred bushels of Kelly's corn on the ninth day of May to fill up a car for his own use, but thinks he replaced the corn some time during the same month.

Appellee makes the claim that Kelly was to take his own chances in getting the corn from Carson's elevator, but this is expressly denied by Kelly and is, in our judgment, a claim wholly without merit. Kelly paid for the stored corn exactly the same price he did for the corn that Kuntz delivered upon his, Kelly's scales, and there is no pretense at all that he was not paying the full market price for the corn stored at Carson's.

The evidence shows that Kelly bought and paid for corn that Kuntz did not deliver, as he had contracted to do; and the manifest weight of the evidence is to the effect that the corn attempted to be delivered was not the same corn which Kelly was to receive from Kuntz.

Other errors are assigned, but we do not think it necessary to review them, as the case is one in which, upon the evidence, there should be a judgment in favor of the appellant for the amount of money paid by him for corn he never received.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Court of Honor v. Carrollton T. Clark.

1. **INSURANCE POLICY**—*what proof not essential to recovery upon.* Proof of the truth of the statements of the applicant is not essential to recovery upon an insurance policy.

2. **WARRANTIES**—*rule of insurance law with respect to.* Warranties are not favored since they must be literally fulfilled and where it is doubtful whether the statements made in the application for insurance are to be regarded as warranties or representations, they will be deemed representations.

3. **WARRANTY**—*what does not render statement a.* The use of the word "warranty" does not necessarily render a statement made in an application a warranty.

Action of assumpsit. Appeal from the Circuit Court of Fulton County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

WILLIAM B. RISSE and MASTERS & MASTERS, for appellant.

MARVIN T. ROBISON and HARRY M. WAGGONER, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Appellee brought suit to recover upon a benefit certificate of insurance issued by appellant to Armillie E. Clark, wife of appellee. Upon the trial a verdict was returned in his favor; judgment was rendered thereon and appellant brings the suit to this court by appeal.

Appellant contends that under the pleadings it was incumbent upon the appellee to prove in the first instance not only the issuing of the policy, the appellee's interest in the life of the insured and the payment of all assessments, etc., but also the performance of fulfillment of the warranties (so-called) contained in the application upon which the policy was issued.

This is not the rule in this state. Appellee proved in chief the issuing of the policy, the date of the death of the

insured and that all dues and assessments were paid up to the time of her death; gave evidence of the furnishing of proofs of death to appellant and appellant's rejection of the claim.

This has been held to make a *prima facie* case in favor of the plaintiff. He is not bound to prove in the first instance the truth of the averments in the application. *Mutual Benefit Life Insurance Co. v. Robertson*, 59 Ill., 123; *Continental Life Insurance Co. v. Rogers*, 119 Ill., 474-485; *Phoenix Insurance Co. v. Stocks*, 149 Ill., 319-326.

In the case last above cited the court say expressly that "To be availed of as a defense, without regard to whether the statements of assured were warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as a matter of defense."

It is further contended by appellant that the statements of the insured in the application signed by her amounted to a warranty of the truth thereof, and were not mere representations.

The language upon this subject in the application, which deceased signed, was in substance as follows: "I declare, answer and warrant as follows: I live at Lewiston; I was born in the State of Michigan on the first day of January, 1871; I am now of sound body and mind, in good health and free from disease; * * * I agree that any untrue or fraudulent statement or answer made to the district medical examiner, or any concealment of facts, intentional or otherwise in this application * * * shall forfeit the right of myself and that of my beneficiary," etc.

Appellant argues that such statement amounts to a warranty and that all appellant need to show to defeat a recovery is that such warranty is not true, without regard to whether or not assured knew or believed them to be true when she made them and without regard to the fact that a physician, acting as an examiner for the company, made examination of the deceased as to her state of health prior to the issuing of her policy.

Upon this subject it is now generally conceded that war-

ranties are not favored, since they must be literally fulfilled. And if it is doubtful whether statements made by the applicant are to be regarded as warranties or as representations, they will be deemed representations. Amer. & Eng. Encyclopedia Law, 2nd ed., vol. 16, page 923; Merchants & Mechanics' Ins. Co. v. Schroder, 18 Ill. App., 216.

We believe this question, *i.e.*, whether the declaration be a warranty or merely a representation, to be fairly settled against the contention of appellant. In the case of Continental Life Ins. Co. v. Rogers, 119 Ill., 474, the answer, statements and declarations in the application for insurance were *warranted* by the assured to be true in all respects, and the further statement made that if the policy was obtained through fraud, misrepresentation, or concealment, it would be null and void. The court there construe the two parts of the clause and say that both elements are to be considered in forming a basis of the decision as to whether the statements make a *warranty* or representation merely, and further say that the only way in which to give that provision of the policy relating to fraud, concealment and misrepresentation any effect at all, is by treating the answers in the policy as representations and not warranties.

The same doctrine is in substance announced in Globe Life Ins. Association v. Wagner, 188 Ill., 133-138, and Connecticut Mutual Life Ins. Co. v. Young, 77 Ill. App., 440.

While the first clause or first part of the statement, standing alone, may perhaps amount to a warranty by the insured, the additional statement: "I agree that any untrue or fraudulent statement or answer made, etc., will forfeit the right of myself and that of my beneficiary," renders the entire proposal or statement a representation merely.

Appellant upon the trial offered in evidence the certificate of death of the insured prepared by one Dr. Talbott to which the court sustained an objection to so much thereof as had relation to the duration of the disease from which the assured died. There was no error in excluding the evidence offered.

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While the statute may require every physician to report the death of his patients to the State Board of Health, yet such report could not in itself be evidence in this suit over the objection of appellee. Such a certificate is not of a judicial character. Even if sworn to it could, at most, be competent only as one of the proofs of death which are usually presented in obedience to some rule of the insurance company. This was in substance all that the court held upon that subject in *Modern Woodmen v. Davis*, 184 Ill., 236, cited by appellant.

Under the holding hereinbefore announced the declarations of deceased as to her condition of health were representations merely and to defeat a recovery upon the policy it would have been incumbent upon the part of appellant to show that such statements were fraudulent. Upon this issue we are entirely satisfied to accept the verdict of the jury. It seems to us to be right under the evidence and should be sustained.

It is not necessary to discuss appellee's instructions, complained of, as they were properly given under the holdings above expressed.

The judgment is affirmed.

Affirmed.

Daniel Bordner, et al., v. J. C. Myers.

1. BILL OF EXCEPTIONS—*what must show*. Where the action of the court in refusing to stay proceedings is sought to be reviewed, the bill of exceptions must show the motion to stay and the exception to the ruling of the court thereon.

Action of debt. Appeal from the County Court of DeWitt County; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

JOHN FULLER, for appellants.

EDWARD J. SWEENEY, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court. Appellee, J. C. Myers, brought suit in the County Court

of De Witt County, against appellants upon an appeal bond and recovered a judgment from which appellants have appealed.

Appellants have assigned several errors, but in their argument say that the only error they care to argue is that the court refused to allow their motion to stay proceedings in such suit until a writ of error (then alleged to be pending in the Appellate Court) could be determined.

The bill of exceptions does not show the making of the motion to stay the action of the court thereon, nor any exception to the ruling of the court.

If error be assigned thereon, such motion and the action of the court upon the motion and appellants' exception thereto must all be embodied in the bill of exceptions. *C., R. I. & P. Ry. Co. v. Town of Calumet*, 151 Ill., 512; *Holden v. Sherwood*, 84 Ill., 92.

Nor is it sufficient that the clerk recites in the record that exception was taken. Nor will joinder in error and submitting the cause be a waiver of defect in this respect. *Martin v. Foulke*, 114 Ill., 206.

Since there is no error in this case properly assigned, the judgment of the lower court is affirmed.

Affirmed.

J. S. ROSS v. E. F. YOUNGMAN.

1. *POSSESSION—taking of, by force, unlawful.* The mere fact that disputed boundaries have been permanently established by virtue of a resort to the act pertaining to the establishment of permanent lines and corners, approved May 10, 1901, does not entitle a party to take possession by force of the land included within the boundaries as determined.

Forcible detainer proceeding. Error to the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1905. *Affirmed.* Opinion filed March 20, 1906.

THOMAS W. TIPTON, for plaintiff in error.

RAYBURN & BUCK, for defendant in error.

ROSS v. Youngman.

MR. JUSTICE RAMSAY delivered the opinion of the court.

The parties to this suit, E. F. Youngman and J. S. Ross, own adjoining lots in the southwest quarter of section 11 in township 23 north, range 2, in McLean County.

There was a dispute between them as to the location of the line between their said lots, and Ross began proceedings in the Circuit Court of McLean County under the law relating to the establishment of permanent lines and corners, approved May 10, 1901, in force July 1, 1901, to have the corners and boundary between said lots permanently established. Such proceedings followed that an order was made by said court approving and confirming report of the commission and establishing the corners and boundary between said lots. Said boundary, by that means, was so established that the south line of Ross's lot was set over to the south so as to include a part of the lot that Youngman had been in possession of prior thereto.

Prior to the making of said order Youngman and his grantors had been in continuous possession of his lot for more than twenty years and had exercised right of possession for that period, up to a fence near the north line of the lot.

After the final order had been made in said proceedings, Ross erected a new fence upon the boundary as established by the order, and by so doing took possession of that much of the premises that Youngman had so possessed, as lay north of the new line. Thereupon Youngman brought this suit in forcible detainer, which on appeal, was tried in the Circuit Court of McLean County, where judgment was entered for Youngman. Ross appeals.

We think that appellant Ross has clearly mistaken the force and extent of the statute relied upon by him. Its only purpose and effect is to provide owners of adjoining lands with an effective means of settling disputed corners and boundaries; it being still necessary for them to resort to the courts by appropriate remedy to recover their respective premises after their corners and boundaries have been permanently established.

The owner of real property has no right to take possession by force, of premises occupied or possessed by another, even though such owner may be justly entitled to such possession. *Phelps v. Randolph*, 147 Ill., 335. Appellant had a complete remedy at law. He should have sought that remedy instead of forcing possession. The judgment is affirmed.

Affirmed.

Jerseyville Shoe Manufacturing Company v. O. H. Bell.

1. **FORMER SUIT PENDING**—*how objection of, may be removed.* The objection of former suit pending may be removed, even after a plea relying thereon filed in the second suit, by dismissal of such former suit.

2. **ASSESSMENT OF DAMAGES**—*what evidence defaulted party cannot introduce.* A party in default cannot introduce upon the assessment of damages evidence which tends to establish a substantial defense to the plaintiff's action.

Action of assumpsit. Appeal from the Circuit Court of Jersey County; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

HAMILTON & HAMILTON, for appellant.

THOMAS F. FERNS, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

O. H. Bell, the appellee, brought suit in the Circuit Court of Jersey county to recover a balance alleged to be due from appellant to him for labor; he recovered a judgment and the shoe company appealed.

While said suit was pending and on the 25th day of September, 1905, appellant filed its plea in abatement setting up that prior to the commencement of suit in the Circuit Court and on the 9th day of June, 1905, Bell had instituted a suit before a justice of the peace for the identical claim sued for and that said former suit was still pending and undetermined.

To this plea Bell filed two replications. The first of said replications set up that after the filing of the plea of abatement and on the 26th day of September, 1905, said former suit was dismissed out of court by plaintiff. The second replication set up that there was not any record of the said supposed former suit remaining in manner and form as in said plea of abatement alleged.

Appellant filed a demurrer to each of said two replications which was overruled. Thereupon appellant elected to stand by its demurrer.

Afterward, upon the assessment of damages, appellant sought to show that appellee's work was defectively done and not up to the standard required by appellant, to the introduction of which an objection was made and sustained on the ground that appellant was in default for want of plea, and appellant excepted.

Appellant first contends that the court erred in overruling its demurrer to the first and second replications; that the plea in abatement was good when filed and that appellee could not, after the filing of the plea, dismiss his former suit and then set that fact up by replication in answer to the plea. This subject is one upon which the authorities are not altogether in accord and while the author and compiler of the first edition of the American and English Encyclopedia of Law, vol. 8, page 551, supports the contention of appellant, yet we do not think that such statement there made is in accord with the more modern holding of the courts. In the Encyclopedia of Pleading and Practice, a somewhat more recent work by the same authority, vol. 1, on page 755, the writer says that "The prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea and thus defeat an abatement," and in a note on page 756 says: "According to the later cases, the objection of a former suit pending is removed by its dismissal or discontinuance, *even after* plea in abatement in the second suit," and cites many authorities in support of the more modern rule.

There was no error in the action of the court in overruling the demurrer to said replications.

It is next said by appellant that the court erred in not allowing it to show after it was in default for want of plea, upon the hearing to assess appellee's damage, that Bell had not done his work properly, so that it would pass inspection and by that means reduce the damages of appellee.

Appellant alleges that the action of the court in that regard was error upon two grounds: first, that a defendant in default can be heard upon assessment of damages upon an inquiry, and, second, that a defendant in default may recoup.

Upon the first of these two propositions appellant lays considerable stress upon the case of Cairo and St. L. R. R. Co. v. Holbrook, 72 Ill., 419, where it was said that "The defendant's rights were not wholly foreclosed by the default. While the defendant admits every material allegation of the declaration it does not admit the amount of damages." This language, however, is not broad enough to admit of a defendant in default giving evidence of a *substantive* defense.

The defense offered upon the inquiry in the case at bar was an affirmative and substantive one. It was in effect an effort to show that Bell's work was improperly done and that by reason thereof he could not recover for his labor; this, if allowed, would have tended to show that Bell had no cause of action, a position not permitted by the authorities where a defendant is in default for want of plea. The case cited (C. & St. L. R. R. Co. v. Holbrook) holds that upon a writ of inquiry the defendant cannot introduce evidence tending to show that plaintiff had no cause of action.

The position that a defendant in default for want of plea cannot give evidence tending to show that plaintiff had no cause of action, is fully sustained by the authorities. Foreman Shoe Co. v. Lewis & Co., 191 Ill., 155; Cook v. Skelton, 20 Ill., 107; Herrington v. Stevens, 26 Ill., 298. In the case last cited the court say that: "On an inquest of

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damages, the right of the defendant does not extend so far as to allow him to introduce a substantive defense."

We cannot say just how much stress appellant lays upon the doctrine of recoupment, for while in its first brief and argument filed herein, on page 21, it says: "In mitigation of damages after default the defendant may recoup for the amount of defective work charged for by appellee that would not pass inspection and it was error to reject the evidence of appellant upon this proposition," in its reply brief on page 4 it says: "There is no question of recoupment involved in the case at bar." We hold, however, that to warrant the admission of evidence in recoupment there must be at least a plea of the general issue. Our courts have held uniformly that a defendant may recoup under that plea without notice; but we know of no case where such action has been had without either plea or notice.

We have no power to allow any additional attorney's fees for services in this court and appellee's claim upon that basis will be denied.

The judgment of the Circuit Court is affirmed.

Affirmed.

Thomas J. Henneberry, et al., v. Hugh A. Binns, et al.

1. SENIOR MORTGAGE—*junior mortgagee not estopped to question amount due under.* While an estoppel to deny the validity of a senior mortgage may exist as against a junior mortgagee where his mortgage has been expressly made subject thereto, yet such mortgagee is not precluded from questioning the amount due under such senior mortgage.

Bill in chancery. Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

BEACH, HODNETT & TRAPP, for appellants.

BLINN & COVEY, for appellees.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Appellees filed a bill in chancery against appellants for an accounting and upon the hearing were awarded a decree for \$901.33 (i.e. \$618.01 to Binns and \$283.32 to Ford), from which decree an appeal was taken by appellants.

Prior to the 18th day of July, 1903, one Hallinan had entered into a contract with the firm of Beggs, Lynd & Henneberry to sell them a lot of about 5,000 bushels of corn; a part of it at thirty-five cents per bushel and a part at thirty-six cents per bushel.

On the eighteenth day of July, 1903, Hallinan made two chattel mortgages, one to Henneberry (a member of said firm) and others, to secure one note to Henneberry for \$1,443.86; one note for \$700 payable to one Brennan; one for \$400 payable to Taylor & Company, and in such mortgage also agreed to secure said Henneberry against loss as surety for having signed four promissory notes with Hallinan, one for \$150 payable to Charles Spence; one for \$150 to Mike Tierney; one to L. C. Schwerdtferger for \$220, and one for \$350 payable to Prather and Company; the other of said two chattel mortgages was made to Binns and Ford to secure the payment of \$900.

The first of said two mortgages covered said lot of corn and some other property. The mortgage to Binns and Ford was made subject to the mortgage of Henneberry et al. and covered the same property, except the corn. Both mortgages were in the usual form with covenant upon the part of the mortgagor that he was lawfully possessed of the said goods and chattels as of his own property, etc.

In August, 1903, Hallinan delivered the corn to Henneberry, who, it is claimed, took and accepted it upon his firm's contract at the agreed price, although at the time of the delivery it was worth forty-eight cents per bushel.

Afterwards Henneberry foreclosed his mortgage, and from the entire proceeds received the sum of \$4,691.44, if he be charged with the corn at forty-eight cents per bushel. He paid all the items of indebtedness described in the first mortgage and expenses in the sum of \$599.42, which aggregated

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\$3,761.86, leaving a balance in his hands of \$929.65, unless he is credited with payment of several items not embraced or described in his chattel mortgage.

Appellants seek to escape liability upon an accounting to said second mortgagees for said over-plus upon several grounds. First, they contend that Henneberry (acting for his firm) received said corn under his contract of sale and he cannot be made to account to the second mortgagees for the actual value of the corn when he received it. This position is not consistent and cannot be sustained.* When Henneberry took a note for the amount due from Hallinan and a mortgage to secure it he, by that action, abandoned his alleged contract of sale. He might have secured his contract of sale by mortgage if he had chosen to do so, but by taking a note, which called for the payment of a sum certain, in cash, he elected to accept the cash, in place of the fulfillment of the contract, and if corn had gone down below the agreed price of thirty-five and thirty-six cents per bushel he could not have been forced to accept less than the amount due on the note, by its terms.

Appellants further contend that appellees are not in position to ask them for an accounting because appellees had no mortgage upon the corn and therefore could not complain of its disposition.

The rule is well established in equity that "A person having the right to satisfy his debt out of two funds, to but one of which another can resort, should be compelled first to exhaust the fund to which the other cannot resort before coming upon the one available to both." 2nd Amer. & Eng. Ency. Law, vol. 19, page 1256.

"The application of the doctrine is in no way affected by the nature of the property constituting the different funds. The rule is enforced whenever a paramount creditor can resort to two funds to only one of which a junior creditor has access." *Idem*, page 1262.

Under this rule appellants were bound to resort first to the corn for the payment of their debt as against the second mortgagees, and therefore appellees can, in this case, insist

upon an accounting for its actual value at the time of its delivery to appellants.

Appellants next contend that since appellees' mortgage was made subject to that of appellants that they are estopped from denying the amount due upon the notes described in such mortgage. We know of no rule that supports that claim.

Appellants cite us to several authorities upon the proposition that a mortgagee or grantee whose right is subject to that of another is estopped from denying the *validity* of the prior claim, but that does not arm the owner of such prior claim with authority to demand more than is actually due; if it did he could not be made to account for payments received by him upon his debt, after taking his mortgage or other security. The court was right in allowing appellants credit for such sum only, as was *actually due* upon the notes described in their mortgage.

The trial court was also right in refusing to credit Henneberry with the payment of claims not described in his chattel mortgage, notwithstanding the fact that some of the debts described therein were described as larger than they were in fact.

To allow appellants to apply funds to the payment of other debts under the claim of paying future advancements, or to use the difference between the actual amount due upon the claims described in the mortgage and the face of the notes, to the payment of claims not described in the mortgage, would be to allow them to change and alter the terms and conditions of the mortgage itself, to the prejudice of the subsequent incumbrance.

It is also contended that Beggs and Lynd should have been made parties to the bill, inasmuch as the corn was bought by the firm before taking the chattel mortgage, and an accounting therefor is asked of the money received by Henneberry.

The evidence shows that Henneberry was acting for the firm of which he was a member and, so far as the interests of the firm were concerned, accepted the mortgage in his individual name, handled and disbursed the funds arising from

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the sale. He is the only one, under the evidence, who could be held as a trustee in this proceeding. The note and mortgage under which we hold that Henneberry must account, were made to him as an individual and all the proceeds of the property came into his hands as such individual; he may have been acting for the firm and for their interest so far as their rights between themselves may go; but as to the rights of appellees he was acting solely as an individual.

The decree of the court was right and is affirmed.

Affirmed.

Jones & Adams Company v. Thomas George.

1. FELLOW-SERVANTS—*how question as to who are, determined.* The question whether the relation of fellow-servants exists is always one for the jury unless the facts admitted or proved beyond dispute show the existence of the relation.

2. ASSUMED RISK—*how question of, is determined.* Whether or not a servant had assumed a risk which resulted in his injury, is a question of fact for the jury.

3. CONTRIBUTORY NEGLIGENCE—*how question of, determined.* The question as to whether the plaintiff was guilty of contributory negligence, is one of fact to be determined by the jury.

Action on the case for personal injuries. Appeal from the Circuit Court of Vermillion County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

H. M. STEELY, for appellant.

CHARLES TAYLOR and S. M. CLARK, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Thomas George brought suit against the appellant company, for injuries alleged to have been sustained by him while he was in appellant's employment as a car-driver in a coal mine. A verdict was returned for \$5,000. Appellee entered a *remittitur* for \$1,500 and thereupon the court rendered judgment for \$3,500, from which appellant has prosecuted an appeal to this court.

Appellee at the time of the alleged injury was driving a mule, hauling coal cars along a mine entry of appellant, when the coal, which was piled above the top of the car, struck some timbers in the roof of the entry which resulted in appellee's being caught between the front end of the forward car and some timbers, from which he suffered injury, alleged to be permanent.

It seems from the evidence that the entry in which appellee was working was what is known as a low entry, being about four feet and six or eight inches from the top of the rail (on which the cars ran) to the bottom of the timbers in the roof. At the time of the injury two different sized cars were in use, varying in height about three or four inches and weighing about 2,200 pounds each; the highest cars being about three feet and six inches high from the top of the rail to the top of the car, which would leave only about one foot of space between the top of the car and the timbers in the roof. These cars were filled by the miners and it was then the duty of appellee to drive them through or along the entry to the mouth thereof. At the time of the injury some of the timbers in this entry, supporting the roof, had sagged in the middle (some of the witnesses put the sag at two or three inches, while Layton says the roof at that place was four or five inches lower), and while appellee was taking out three loaded cars, and riding on a seat hooked on the front end of the forward car, the coal in the front car, because of its height above the top of the car, caught against these sagged timbers in the roof of the entry, and the car was jerked or thrown in such a way that appellee was caught between the car and timbers, and injured. The negligence alleged consisted in allowing these timbers to become sagged down and remain in a dangerous and unsafe condition.

Appellant first contends that it was error for the court to allow appellee to testify that he had been put to expense for nursing, which nursing was done by members of his family, and also to testify that he had a wife and three children. The admission of this evidence was error, but was such error that it could be cured by a *remittitur*. The ex-

pense alleged for nursing was less than \$20, and so trifling that the effect of admitting such evidence, as well as that of the appellee having a family, was wholly and amply overcome by the *remittitur* of \$1,500.

Appellant also contends that the coal miners who loaded the coal too high upon the cars, were the fellow servants of appellee and therefore he could not recover.

"The question whether the relation of fellow servants exists is always one for the jury, unless the facts admitted or proved beyond dispute show the existence of the relation." *Hartley v. C. & A. R. R. Co.*, 197 Ill., 440. In this case the court cannot say from the evidence that these servants were so directly co-operating with each other in a particular business, or that they were in such habitual association that they could exercise a mutual influence, one upon the other.

The question of relationship then was one of fact for the jury, under the definition of the term as given by the court. The rule on this subject was fully and fairly stated to the jury by the appellant's eighth, ninth and tenth instructions.

It is also contended by appellant that the risk involved was one which appellee assumed; and also that appellee was guilty of negligence which contributed to the injury.

Whether or not appellee assumed the risk was also a question of fact for the jury. In determining whether or not appellee was in any way chargeable with knowledge of the defective condition of the roof, the jury had the right to take into account the uncertain light in use, the exacting character and nature of the work appellee was doing, and from all the surrounding circumstances determine whether, in passing back and forth, appellee had time to and did take into account the condition of the roof timbers, or whether his time and attention were given to his mule and cars and to the track ahead of him. If the care which his work demanded did take all his attention, then he was not in a position to notice the condition of the roof timbers and their exact position.

The question of contributory negligence on the part of appellee was also one for the determination of the jury.

He was riding upon the car in a manner and upon a seat which the company had provided, in a very low entry having broken or sagged roof timbers, using cars of two different sizes and loaded with coal too high, by men that the jury had the right to say were not his fellow servants.

These two matters were fully and fairly left to the jury upon the evidence under the instructions, and their conclusions are not against the manifest weight of the evidence.

There was no error in admitting testimony to show that the labor which appellee did after the injury was reasonably worth only \$1.16 per day, instead of \$2.23 which he was then receiving from appellant.

The evidence warranted the conclusion that he was unable to do heavy work or to assume the burdens of his former station as driver, and under such circumstances it was proper to show what his services were reasonably worth, *i. e.* what he could reasonably expect to earn, although appellant was paying him more for that work than others got for like services.

Appellant's criticism of appellee's fifth instruction that it omitted to state that plaintiff could not recover if he had equal opportunity with the employer for knowing of the alleged defect, would have some force if appellant's seventh instruction as given, had not fully covered that point; as it did, however, appellant cannot complain.

The criticism of appellee's second instruction is without any force, as that instruction merely defines what would be due care upon the part of appellee, and does not direct a verdict.

The instructions as a series seem to have stated the law governing the case fully and fairly for appellant and we do not think it has any reason to complain upon that score.

There are other errors alleged which we do not discuss, as we believe them to be without merit, and discussion thereof would prolong this opinion to undue proportions.

There was evidence in the case tending to show that appellee was permanently injured and upon a review of the whole evidence we think that the damages, \$3,500, are not excessive, and the judgment is affirmed.

Affirmed.

Walter A. Spurgin v. George W. Kruse.

1. *SET-OFF—when defense of, cannot be interposed.* A defense of set-off cannot be interposed in an action to recover a penalty provided for by statute.

2. *RECOUPMENT—when defense of, may be interposed.* Recoupment is in law a mitigation of damages and the defense is of such a nature as will permit a claim originating in contract to be interposed as against one suing in tort; likewise damages for a tort may be recouped against a claim predicated upon a contract.

Action of debt to recover penalty. Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded with directions. Opinion filed March 20, 1906.

ELTING & O'HARRA, for appellant.

NEECE & SON, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Walter A. Spurgin brought suit in the Circuit Court of McDonough county against George W. Kruse under section two of an act to regulate the sale of property under chattel mortgages, approved June 21, 1895, in force July 1, 1895.

The declaration set out in substance that Spurgin made a chattel mortgage to Kruse upon 859 head of sheep to secure the payment of a promissory note for the sum of \$2,140; that upon the maturity of said note Kruse took possession of said property under his mortgage and sold the same, but did not make out any statement showing the items of said property sold, the names of the purchasers and amount for which each article sold, and did not within ten days after the sale deliver an itemized statement of such sale to the plaintiff, by means whereof, under said statute Kruse became liable to Spurgin to the extent of one-third the value of the property so sold.

Kruse, the appellee, filed two pleas; the first was the gen-

eral issue, and the second was a plea of set-off, setting up the note secured by the chattel mortgage and asking, as against the sum due from Kruse to Spurgin, to set off the balance then due from Spurgin to Kruse upon the note.

To this second plea Spurgin, appellant, filed a demurrer which was overruled by the court. Appellant excepted to the ruling of the court, elected to stand by his demurrer and brings the suit to this court upon appeal.

We think the trial court was in error in overruling the demurrer to said second plea.

Our statute governing practice in courts of record, section thirty, provides that a defendant may plead set-off or give notice thereof under the general issue, in any action brought upon any *contract* or *agreement*, either express or implied. This suit is one to recover a penalty for an alleged violation of a *statute*; and is not for a breach of a *contract* or *agreement*.

In cases where our courts have held that a judgment is not a contract within the meaning of the statute in relation to what may be matters of set-off, they have said that the words "contract" and "agreement" are used in their ordinary sense, and not with the intention of embracing every imaginable litigation upon every cause of action. *Rae v. Hulbert*, 17 Ill., 572; *Ambler v. Whipple*, 139 Ill., 311-318.

We do not think there can be any doubt that such words, so employed in our statute, are not broad enough to admit a plea of set-off in a case like the one at bar, and that the demurrer to the second plea should have been sustained.

As this case must be reversed for trial, it may be right to say that we see no reason why Kruse cannot recoup under his plea of the general issue and by that means reduce Spurgin's recovery to the extent of the balance unpaid, if any, upon the note involved.

Even if appellant's right of action is not founded upon a contract, but rests in tort, appellee can recoup, if that right to recoup grows out of the same subject-matter or transaction. Recoupment is really a doctrine of mitigation of dam-

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ages, and has been held to permit a claim originating in contract to be allowed in recoupment against one founded in tort, and damages for the tort to be recouped in a suit upon a contract. *Streeter v. Streeter*, 43 Ill., 155; *Burroughs v. Clancey*, 53 Ill., 30; *Scott v. Kenton*, 81 Ill., 96.

While the note upon which appellee may seek to recoup is signed by another person, besides appellant, yet it appears from the averments in the declaration that the indebtedness witnessed by the note was the debt of appellant. Therefore, since the suit is brought by the principal maker of the note, it is competent to recoup the balance unpaid upon the note.

The judgment is reversed, with direction to the Circuit Court to sustain the demurrer to the second plea.

The judgment is reversed and the cause remanded.

Reversed and remanded; with directions.

George Reisch, et al., v. Lizzie M. Foster.

1. INSTRUCTION—*when failure of, to confine jury to declaration, not error.* An instruction which refers to "the alleged assault," without referring to the assault as described in the declaration, is not erroneous where there was only one assault mentioned in the evidence.

Proceeding under Dram-Shop Act. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

SHUTT, GRAHAM & GRAHAM, for appellants.

ROBERT H. PATTON and JAMES E. DOWLING, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Lizzie M. Foster, the appellee, brought suit in the Circuit Court of Sangamon county, against appellants, under the Dram-Shop Act, claiming that her husband became in-

toxicated in a saloon conducted in a building owned by appellants, and that while so intoxicated he assaulted appellee, by means whereof she miscarried and suffered nervous prostration, etc. The jury returned a verdict in appellee's favor for \$500, judgment was rendered thereon and Reisch et al. appeal.

Appellants emphasize three grounds only, upon which they ask for a reversal of the judgment. They first contend that the verdict is the result of passion and prejudice and not warranted by the evidence. Upon a careful review of the record we cannot adopt that view of the case. Two or three witnesses testified that appellee's husband drank liquor several times in the saloon conducted on the premises of appellants on the day in question; and even if the testimony of B. N. Foster (the husband) be entirely ignored as unworthy of belief, as claimed by appellants, there is still ample and sufficient evidence to warrant the jury in finding that Foster drank liquors in such saloon and became intoxicated by reason thereof.

Appellants next contend that the damages were excessive and that such excessiveness is suggestive of punitive damages. We do not think so. Judging from the size of the verdict, we do not believe the jury had any thought of awarding any damages beyond actual damages. The assault upon the appellee in her condition, with the results that followed, were enough to warrant the verdict returned as compensatory only.

Appellants also contend that the instructions given for appellee were erroneous and should not have been given. Objection is made upon the ground that in the instructions for appellee the court referred to the alleged *assault* without referring to the assault as described in the declaration. We do not see how this could have misled the jury. There was only one assault involved and that was the one described in the declaration. No evidence was offered as to any other. The same question arose in the case of C., B. & Q. R. R. Co. v. Avery, 109 Ill., 314, where the court say: "It is objected to the second instruction that it is

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too broad in that it does not confine the rights of recovery to the negligence alleged in the declaration. As applied to the facts, there not being a particle of evidence of any other negligence than that alleged in the declaration, the instruction cannot be said to be erroneous in the respect named." Furthermore, appellants' third instruction as given was open to the same criticism (if it be an objection) in which the matter was referred to as "the injury in question," without reference to the charge as laid in the declaration. Appellants were, therefore, in no position to complain upon that account.

The other objections urged to the instructions as given for appellee do not, in our judgment, merit discussion.

The instructions as a series stated the law with substantial accuracy and the judgment of the lower court was right.

The judgment is affirmed.

Affirmed.

James McIntosh, et al., v. Carrie E. Fisher, et al.

1. *DECLARATIONS—when competent to establish gift.* Where it has been shown that an actual delivery of personal property has been made by the deceased which according to the intention might or might not constitute a gift in law, the declarations of the deceased made both before and after such delivery are competent.

2. *INCOMPETENT EVIDENCE—when admission of, will not reverse.* Where a trial is had before a court without a jury, the admission of incompetent evidence will not reverse if there is sufficient competent evidence in the record to sustain the finding.

Petition under statute to compel property to be turned over to executor. Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

CHARLES W. FLACK and RALPH W. PONTIOUS, for appellants.

CHARLES J. SCOFIELD, NEECE & SON and ELTING & O'HARRA, for appellees.

MR. JUSTICE RAMSAY delivered the opinion of the court.

Joseph W. McIntosh died on July 28, 1904, leaving his last will and testament in due form, executed on the second day of April, 1904, in which he appointed Carrie E. Fisher (one of his daughters) and one Elmer T. Walker, as executrix and executor.

On the 24th day of October, 1904, said executrix and executor filed their inventory of the estate of deceased, whereupon appellants (three of the children of deceased) filed their petition in the County Court of McDonough county, alleging that said Carrie E. Fisher and Alleyne McIntosh, another daughter of deceased, had in their possession a large amount of property belonging to the estate of deceased, which had not been inventoried as property of the estate, and praying that upon the hearing said property should be inventoried and turned over to the executors as estate property.

A hearing was had upon such petition and an order made thereon, from which order an appeal was taken to the Circuit Court of said McDonough county, where another trial was had before the judge without a jury, and judgment rendered to the effect that the property involved belonged to said Carrie E. Fisher and Alleyne McIntosh and was not the property of the estate. From that judgment appellants prosecute this appeal.

The appellees, Carrie E. Fisher and Alleyne McIntosh, claim that their father gave them the property in controversy a few days before his death, and the determination of this case turns upon the sufficiency and competency of the evidence to warrant the trial court in its holding that such property was a gift by the father to said two daughters.

Appellants first contend that the trial court erred in admitting in evidence the declarations of the deceased to the effect that he intended to make a gift to his daughters Carrie and Alleyne of the property in question, and invoke the rule announced in the case of *Barnum v. Reed*, 136 Ill., 388, in support of their contention. The rule there announced to the effect that such declarations are inadmissible in evidence

to show an intention merely on the part of deceased to make a gift would control us in the disposition of this case if appellees' claim did not rest upon an alleged perfect gift, completed by actual delivery.

If deceased actually delivered the property in dispute to the daughters, or one of them (which subject of delivery we will discuss later), under circumstances which may, or may not, have been a gift according to the intention of the testator, then his statements both before and after that time are competent in determining the character of the delivery, and the court committed no error in receiving such evidence.

The other evidence, to which objection was made, having for its purpose the fixing of the value of the different amounts received by the various children, cannot have been so prejudicial as to warrant a reversal. Even if it was incompetent, it will be presumed that the trial court disregarded or ignored it. "Where there is sufficient competent evidence to justify a judgment, the admission of incompetent evidence is not a ground for reversal where the case is tried by the court without a jury." *Kreiling v. Northrup*, 215 Ill., 195.

It is next contended by appellants that there was not sufficient evidence to warrant the trial court in finding that the property involved was in fact given by the father to his two daughters, Carrie and Alleyne.

It would be impossible for us to review all the evidence in this case, as it is very voluminous and in many particulars in sharp conflict; and while the evidence upon the subject of gift is very close and in some respects far from satisfactory, yet we think it sufficient to sustain the findings of the trial court, whose means of judging of the weight of the evidence and character of the witnesses is superior to the means which we possess.

There is ample evidence to the effect that when deceased executed his will he then intended to make, for his daughters, Carrie and Alleyne, further and additional provision to that named in the will, and that he did not want that further and additional provision in the will, as he meant to

attend to that while he was alive. It appears that the two daughters lived with their father as part of his family and had for many years prior to the time of his death; that a few days before his death deceased directed Carrie to go to the bank and get his black pocketbook with the papers, which she did. Afterwards deceased and his said two daughters were seen together looking over papers (which were the ones relating to the property in dispute), with the black book lying near by, and that very soon after that deceased said to a domestic that he wanted Carrie and Alleyne to go ahead and build a new house; that he had given them a plenty and that he wanted the domestic to remain in their service as she had in his. Joseph W. McIntosh, son of the deceased, testified that only a short time before his father's death, deceased said to him: "I have given to Alleyne and Carrie a little more than I have the rest of you, but they deserve it. I have given Alleyne and Carrie my gas stock, my Atchison, Topeka and Santa Fe stock, and all my other stock and mortgages."

It also would seem from the evidence that said pocketbook and papers were never returned to the bank after withdrawn by Carrie, but were in the possession of Alleyne in her chiffonier, and in her own custody and control immediately after her father's death.

There was, therefore, very strong evidence tending to show an actual delivery by the father of the property in dispute.

Appellants, however, lay great stress upon the fact that Elmer T. Walker visited deceased shortly before his death and had a conversation with him and at the request of deceased prepared a memorandum giving direction how he wished certain of his property handled, which they contend dispute the alleged gift to Carrie and Alleyne. How much weight was to be given to such memorandum and conversation had at the time between Walker and deceased, was a matter for the trial court to determine, and upon that head we cannot say that his holding thereon was against the manifest weight of the evidence. Such memorandum and said conversation may tend to disprove the gift; but to us

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it seems that they are far from being conclusive. According to the memorandum, deceased wanted to give Joseph W. a 240-acre farm, which he had already given him by his will. And deceased said he wanted to tell him (Walker) what he had already done, so there would be no misunderstanding, and would like to make a few requests in regard to it; that he did not want any lawyer to interfere, etc. Certainly such statements must have been more or less confused and uncertain, as deceased was in no way attempting to make a new will or change or alter the old one; furthermore, Walker says it was very difficult to talk to deceased and that the conversation had to be almost in a whisper and it was difficult to hear what he said.

Under the circumstances it seems to us that no definite understanding was stated by deceased to Walker and that the effort of Walker to give force to the statement by adding to the memorandum the words: "Memorandum taken down at the request of J. W. McIntosh while entirely rational in every way," adds nothing to the force of the claim. The memorandum was that of the witness Walker and not that of deceased. In it a gift of lands was attempted; a thing Walker must have known would be wholly inoperative unless signed by deceased and witnessed. We do not regard such evidence as of such a convincing and conclusive character that we can say the trial court erred in not adopting the theory suggested by it.

Stress is also laid by appellants upon the fact that some of the appellees sought to have appellants release their claim to Carrie and Alleyne to the property involved by executing a paper to that effect, but this effort may well have been a result of a desire to settle without suit and thus avoid the cost and delay of litigation. This theory finds support in the fact that the effort to so adjust was forwarded by some of the children of deceased other than Carrie and Alleyne.

It was the duty of the trial court, sitting in place of a jury, to hear the evidence and determine the weight to be given to it, and his finding thereon should have the same

force and effect as the verdict of the jury. We do not think the findings of the trial court were against the weight of the evidence; but that there was sufficient evidence in the case to support the judgment.

The judgment is therefore affirmed.

Affirmed.

Jacksonville & St. Louis Railway Company v. J. W. Stewart.

1. VERDICT—*when set aside as against the weight of the evidence.* A verdict will be set aside where it is manifestly against the weight of the evidence. In this opinion it appears that the appellee's case rested wholly upon his own testimony and he was contradicted by the testimony of six witnesses.

Action on the case for personal injuries. Appeal from the City Court of Litchfield; the Hon. PAUL McWILLIAMS, Judge, presiding. Heard in this court at the May term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

JOSEPH A. CONNELL, for appellant; CHESTER M. DAWES, of counsel.

AMOS OLLER and LANE & COOPER, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

Appellee recovered a verdict and judgment against appellant for \$500, for personal injuries sustained by its alleged negligence. The only ground here urged for a reversal of the judgment is that "the verdict and judgment of the court below are contrary to the evidence and the weight thereof."

On May 11, 1903, appellee and twenty other section hands in the employ of appellant were returning to Litchfield on two hand cars, after their day's work. Eleven men were riding on the large car in front and ten men, including appellee, were riding on the smaller car in the rear. While the small car was running at a speed of 6 to 9 miles an hour, and at a distance of 10 to 15 feet from the large car,

it was derailed, and the men riding thereon were thereby thrown to the ground and appellee was injured. It is contended by appellee that the derailment was caused solely by a bent axle and a loose and wabby wheel on the small car, while appellant contends that the car was derailed by reason of one of the men accidentally falling therefrom in front of the car and the car running over him.

Upon the questions as to whether the axle of the car was bent, and whether the wheel was loose and wabby, the finding of the jury must be held to be conclusive upon this court. Several witnesses testified that those conditions existed, and the jury having personally inspected the car it will be presumed that such inspection disclosed evidence corroborative of the testimony of such witnesses. There is also evidence tending to show that the defects in the wheel had existed for several days before the accident and that they had been called to the attention of appellant's foreman.

Appellee testified that he felt the car climbing the rail and it threw him off; that he and Burge (by whose accidental falling it is claimed by appellant the car was derailed) went off about the same time; that the car climbed the rail before Burge fell off. Burge testified that he was pumping the car when it was derailed; that he felt a jar and his hold on the handle slipped, and he then fell off. His cross-examination, however, very perceptibly weakened the force of his testimony favorable to appellee's contention.

Samuel Thompson, a witness for appellee, testified that he noticed no difference in the way the car was riding the rail at the time Burge fell off; that he did not feel any jar before Burge fell off. William Meachin, also a witness for appellee, testified that Burge first fell off the car, and the car ran over him, and about that time the car left the track; that as the car ran over Burge it appeared to raise up a little on the side he (witness) was standing on; that he felt no shock before the car ran over Burge. William Crook, another witness for appellee, testified that he did not know what threw the car off the track; that the car was rid-

ing on the rails all right up to the time Burge fell off; that he felt no jar before that.

William Foams, Robert McClusky and John Price, witnesses called on behalf of appellant, all testified in substance that nothing happened to the car until Burge fell off; that up to that time the car was running along all right upon the rails; that they did not feel any jar or shock before Burge fell off. Burge testified that the wheel of the car passed over his foot and made a mark on his shoe. There is evidence strongly tending to show that the men on the rear car were exerting every effort to keep as close as possible to the front car, which was larger, geared higher and much faster than the rear car, and that when the rear car came within reaching distance of the front car, the men on both cars, in a spirit of fun and banter, attempted to take hold of each other. It is quite evident that Burge and others on the rear car, who were doing the "pumping," were directing their efforts more particularly to running the car at its utmost speed, and as close as possible to the front car, and in so doing were exercising little, if any, caution for their own safety.

There have been three trials of this case, the first and second resulting in a disagreement of the jury. A careful examination of the testimony as it appears in the record, compels us to the conclusion that the contention of appellant that Burge fell from the car before it was derailed, and that it was derailed in consequence of his so falling in front of the car, and not by reason of any defect in the axle or wheel of the car, is supported by the greater weight of the evidence.

Appellee's case rests almost entirely on his own testimony, while the contention of appellant as to the cause of the accident is supported by the testimony of six witnesses, fellow laborers of appellee, five of whom were not in the employment of appellant at the time of the trial.

Because the verdict is against the manifest weight of the evidence the judgment is reversed and the cause remanded.

Reversed and remanded.

Springfield Consolidated Railway Company v. George Y. Pickett.

1. **RELEASE**—*what question proper where validity of, is questioned.* Where the validity of the release of a claim for personal injuries is sought to be questioned, it is proper to inquire of the releasor if when he put his mark upon the paper in question he did or did not know that he was signing away his claim for damages.

2. **VERDICT**—*when set aside as against the evidence.* A verdict will be set aside where it is manifestly against the weight of the evidence.

Action on the case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

WILSON, WARREN & CHILD, for appellant.

WILLIAM L. PATTON and COOPER & FITZGERALD, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellee against appellant to recover damages for a personal injury. There was a verdict and judgment in the court below against appellant for \$2,500.

The facts of the case, briefly stated, are substantially as follows: On September 20, 1904, appellee, a deaf mute, was, with other citizens of Springfield, standing in East Washington street watching the fire department on its way east on that street in response to an alarm. Appellant has two tracks on Washington street, upon which it operates a street railway, the north track being the west-bound track and the south track the east-bound track. While appellee was in the middle of the street between the two tracks of appellant, and looking east, he was struck by an east-bound car of appellant on its south track and knocked down in such manner that the wheels of the car passed over his feet, inflicting injuries which necessitated the amputation of a

portion of his left foot and the two greater toes of his right foot. On the day following his injury, appellee, in consideration of the payment by appellant of his surgical and hospital charges and expenses, executed a formal release of all claims for damages against appellant.

The declaration charges generally that appellant carelessly and negligently ran and operated its street car. The specific acts of negligence relied upon by appellee to sustain a recovery, are that the car was running at an excessive rate of speed and that no warning signal was given of its approach.

It is urged in reversal of the judgment that the court admitted improper evidence on behalf of appellee; that proper instructions offered on behalf of appellant were refused by the court; and that the verdict is contrary to the manifest weight of the evidence.

Upon the issue whether or not appellee's signature to the release was procured by fraud, there was evidence tending to show that at the time appellee signed the same by making his mark, he was suffering severe pain; that he was nervous and tremulous; that his wounds were partially dressed; and that the surgeon in charge had temporarily suspended an examination of his wounds in order to enable a claim agent of appellant to interview him. The conditions surrounding appellee, together with the fact that he could neither speak nor hear, were circumstances proper to be considered by the jury in determining whether or not he had been fraudulently imposed upon.

Upon his direct examination appellee was asked, whether, when he put his mark on the paper, he did or did not know that he was signing away his claim for damages against appellant, and he replied, "No, I thought it was a request." The question and answer were objected to by appellant and the objections overruled. Upon the authority of *National Syrup Co. v. Carlson*, 155 Ill., 210, the question was proper, and the court did not err in overruling the objection. The portion of the answer following the word "No," was not responsive to the question, and was, we think, improper, as

in effect permitting the witness to state what his understanding—his thought—was with respect to the character of the paper. *National Syrup Co. v. Carlson, supra*; *C. & A. Ry. Co. v. Jennings*, 114 Ill. App., 622. We do not, however, desire to be understood as holding that the refusal of the court to strike out the portion of the answer not responsive to the question, would, in this case, be sufficient ground for reversal of the judgment.

Our attention is directed to two instructions which counsel for appellant insist were improperly refused, but an examination of the record discloses that the instructions were given as modified by the court. There was no error in modifying the instructions, and as modified they stated the law as favorably for appellant as it was entitled to.

Upon the issue whether or not appellant was guilty of negligence, and whether or not appellee was in the exercise of due care for his own safety, we are constrained to hold that the verdict of the jury is against the manifest weight of the evidence.

While his inability to hear the gong signal, if given, made it impossible that neglect to sound the gong could have been the proximate cause of his injury, it is practically conceded by appellee that the gong on the car was continuously and loudly sounded by the motorman at and before the time the accident occurred. Indeed, counsel for appellee formulates a line of argument predicated on the giving of the signal, and insists that the motorman must be held to have known that appellee was deficient in his sense of hearing because he did not get off the track when the car was approaching him, and having such knowledge, that the motorman was guilty of negligence in not bringing the car to a stop before it struck appellee.

A very careful analysis and consideration of the evidence in the record leads us to the conclusion that a clear preponderance of the evidence tends to show that the car was travelling at a speed of from two to four miles an hour at the time of the accident, and not ten to fifteen miles an hour, as claimed by appellee; that appellee, intent upon look-

ing east at the fire department, gave no heed to the possible approach of a car from the west on the south track, and did not look to the west to ascertain whether a car might be approaching; that until the car approached within five or six feet of appellee, he was standing in a place of safety between the two tracks, and that he then suddenly stepped to the east and south, sufficiently near to the north rail of the south track to be struck by the fender of the car. The motorman had no knowledge of appellee's infirmity, and was justified in assuming that appellee could hear the signal and that he would remain in a place of safety until the car had passed.

For the reasons stated the judgment is reversed and the cause remanded.

Reversed and remanded.

Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. George H. Huston.

1. VERDICT—*when set aside as against the evidence.* Where it is manifest from the evidence that the injury of the plaintiff for which recovery is sought was induced by his own negligence, a verdict in favor of such plaintiff will be set aside.

Action on the case for personal injuries. Appeal from the Circuit Court of Coles County; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1905. Reversed, with finding of fact. Opinion filed March 20, 1906.

GEORGE F. McNULTY, for appellant; H. A. NEAL, of counsel.

EDWARD C. and JAMES W. CRAIG, JR., for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellee against appellant to recover damages for personal injuries resulting from the alleged negligence of appellant. There was a verdict against appellant for \$1,000, a voluntary *remittitur* by ap-

pellee of \$100, and a judgment against appellant for \$900.

The declaration contains four counts. The first count alleges that appellee was in a certain wagon drawn by a horse which he was driving south on 16th street in the city of Mattoon, toward the railroad crossing of appellant on said street; that while appellee was on said railroad crossing and in the exercise of due care for his own safety, the servants of appellant so carelessly and improperly drove and managed its locomotive and train that the same struck appellee's wagon with such force and violence that appellee, in order to save his life, was forced to jump out of said wagon and was thrown to the ground, whereby he was injured, etc. The second count alleges negligence of appellant in failing to ring a bell or blow a whistle while approaching said crossing, as required by statute. The third count sets up an ordinance of the city of Mattoon requiring appellant to maintain a sufficient gate or gates at said crossing and alleges the failure of appellant to comply with such ordinance, and that such failure was the proximate cause of appellee's injury. The fourth count alleges as the proximate cause of appellee's injury a violation by appellant of an ordinance of the city of Mattoon, prohibiting the running of any locomotive or train within said city at a speed exceeding six miles an hour.

Various grounds are urged by appellant for a reversal of the judgment, but in the view we are constrained to take of the case, it will only be necessary to discuss and determine the question whether or not, appellee was guilty of negligence contributing to his injury.

The uncontroverted facts in the case are substantially as follows: Appellant has four tracks crossing 16th street. The first or north track is a house track, the second is the north main, or west-bound main track, the third is the south main, or east-bound main track, and the fourth, or south track, is the elevator track. Appellee was engaged in hauling freight to and from appellant's freight house, and in so doing he crossed the tracks on 16th street fifteen or twenty times a day. He knew there were no gates at the crossing;

that engines and cars frequently ran on the tracks, switching and otherwise; and that a flagman was stationed at the crossing by appellant to warn travellers on the street of danger. On September 18, 1904, as appellee approached the crossing from the north in a wagon, he found the crossing blocked by the box cars of a freight train standing on the north main track, and found Joseph Ingle with a team and wagon on the east side of the street waiting for the crossing to be unblocked. After waiting some time appellee and Ingle asked the brakeman on one of the box cars to cut the train so they could get through, and thereupon the brakeman uncoupled two cars nearest the east line of the street and signaled the engineer to go ahead. Notwithstanding Ingle was directly in line of the point where the cut was made and nearer to such cut than appellee, appellee, while the cars were moving westward, and when the opening at the crossing was only from 8 to 10 feet, without waiting for a signal from the flagman, who was properly on the south side of the crossing, and while his view of the other tracks was obscured by the box cars, urged his horse forward in a run in order to make the crossing in advance of Ingle, and hurriedly drove across the north main track between the cars. After appellee had crossed the north main track, and while he was crossing the south main track, his wagon was struck by the forward car of a cut of 8 or 9 coal cars which was being switched eastward on that track, and the alleged injury resulted.

Appellee, while on the north side of appellant's tracks, and until he came upon the north main track, was hidden from the view of the crossing flagman, and several persons on the south side of the tracks who were waiting an opportunity to cross, but as soon as his horse appeared in the cut and it was evident he contemplated crossing the tracks, the flagman and two or three other persons attempted by signals and loud calls to warn appellee of the danger and to prevent his crossing the south main track. Because appellee gave no heed to the signals and shouts or because he

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was unable to check his horse, or because he determined to take the chance, he drove ahead and was injured.

There is a conflict in the evidence as to whether or not the bell was ringing on the engine which was pushing the cut of coal cars, and whether or not the coal cars were running at a speed in excess of that prescribed by ordinance, but the clear preponderance of the evidence tends to show that appellant was not negligent in either regard.

Assuming, however, that appellant was guilty of the negligence alleged, it does not follow that appellee is entitled, as a matter of course, to recover damages for a resulting injury. It is as essential to appellee's right of recovery that he should aver and prove that he was in the exercise of due care and caution for his own safety, as that appellant was negligent.

The facts and circumstances in evidence in this case so clearly show that appellee was injured because of his own heedlessness, and want of the slightest care for his own safety, that the judgment must be reversed, with a finding of fact to be incorporated in the judgment of this court.

Reversed, with finding of fact.

FINDING OF FACT: We find that appellee was guilty of negligence contributing to his injury.

Samuel P. Kelly v. Robert Judy.

1. INSTRUCTIONS—*when party cannot complain of omissions in oral.* A party cannot complain of the failure of the court to instruct the jury upon a particular proposition where the court has instructed the jury orally by consent, if he has not specifically directed the attention of the court to such omission at the time the instructions were being given.

Action commenced before justice of the peace. Appeal from the Circuit Court of Vermillion County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

D. D. DONAHUE, for appellant.

OSCAR H. WYLIE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellant against appellee, originally commenced before a justice of the peace, to recover \$28.91 upon a book account. The verdicts and judgments in both courts were in favor of appellee. The record discloses that the evidence tending to support the contention of the respective parties is inextricably conflicting and would support a finding for either party upon the merits of the controversy.

Upon the trial appellant desired to introduce in evidence his ledger for the purpose of showing the state of appellee's account, but anticipating an objection by appellee thereto, suggested that appellee waive the necessary preliminary proof of its competency as evidence, whereupon, counsel for appellee, who was desirous of obtaining an advantage which might accrue to his client by reason of certain alleged apparent erasures and alterations in the ledger account, consented to waive such preliminary proof and the ledger was admitted. It is now insisted by appellant that appellee's consent to the introduction of the ledger must be held to be an admission by him of the correctness of the ledger account. There is no force in this insistence. Appellee merely waived certain preliminary proof, which, it was conceived by the parties, would make the ledger competent to be considered in evidence, and such waiver was not an implied admission on the part of appellee that the ledger account was true and correct, and did not preclude appellee from attacking the correctness of the account, thereby shown, by any legitimate evidence at his command.

By consent of the parties, the trial court instructed the jury orally, and the instructions so given state the law applicable to the case with substantial accuracy. If appellant desired to have the jury instructed as to the law applicable to some phase of the case, which he conceives was omitted by the court, it was his duty specifically to direct the attention of the court thereto, and if that had been done, the

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court would, doubtless, have covered the point by proper instructions.

The record being free from error, the judgment is affirmed.

Affirmed.

**David H. LaForge and Harry C. Thompson, Trustees,
et al., v. Hugh A. Binns, et al.**

1. *SERVICE OF PROCESS—when party entitled to notice by.* Where a petition is filed in a pending proceeding which is wholly unrelated to the subject-matter of such pending proceeding, parties joined in such petition should be notified by summons.

2. *LAST WILL AND TESTAMENT—what does not disqualify trustees from acting under.* Mere absence from the state does not disqualify a trustee from acting pursuant to the appointment contained in a last will and testament. In order that such a trustee may be removed by a court of chancery it must appear that he has been unfaithful, negligent, or in some wise has broken his trust.

3. *JOINT TENANCY—title of trustees appointed by will is.* Trustees holding an estate by virtue of an appointment by will are joint tenants and the estate which they hold is one of joint tenancy and, in the absence of a provision in the instrument creating the trust for the appointment of a successor in case of the death, resignation or removal of one of the original trustees, the entire trust vests in the remaining or surviving trustee or trustees.

Petition for removal of trustee, etc. Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1905. Reversed. Opinion filed March 20, 1906.

ROBERT HUMPHREY, Guardian *ad litem*, and BEACH, HODNETT & TRAPP, for appellants.

BLINN & COVEY, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

The facts in this case, preliminary to the filing of the petition and the decree of the court thereon, here involved, are fully stated in the opinion of the Supreme Court in *Binns v. LaForge*, 191 Ill., 598, and we deem it unnecessary to restate the same.

February 22, 1902, appellees, Hugh A. Binns and Edwin B. Maltby, co-executors of the last will and testament of R. A. Talbott, deceased, filed their petitions in the Circuit Court of Logan county representing that they were creditors of Benjamin S. Talbott and Gertrude Talbott; that their claims amounted in the aggregate to \$4,300; that by a decree of the court they had been found to be such creditors and entitled to their proportionable share of the income of certain lands held in trust by appellants as trustees, less the amount decreed by the court to be paid to said Gertrude M. Talbott; that by the last will and testament of Garrett M. LaForge, deceased, appellants, David H. LaForge and Harry C. Thompson, were appointed trustees of said lands, and that said Harry C. Thompson over one year ago removed from his home in Mason county, Illinois, to the city and State of New York, and was then doing business in said city of New York.

The petition further represents, on information and belief, that said Thompson does not attempt to discharge his duties as such trustee and is so situated that he cannot properly discharge his said duties, which consist, among other things, in renting lands in Logan county, collecting rents therefor and making annual reports to the court.

The petition prays that said Thompson may be removed as such trustee, and that some suitable and responsible person be appointed his successor in trust.

March 6, 1902, appellants filed their answer to said petition, wherein they allege their appointment as executors and trustees in and by the last will and testament of Garrett M. LaForge and their qualification as such; that they were so nominated and appointed to their office because of the personal confidence which the testator had in them, and because they were his grandsons and the brother and cousin respectively of Gertrude M. Talbott, the *cestui que* trust; that said trust was a personal trust and executorship and was a surviving office which could be filled only by them or the survivors of them, unless guilty of malfeasance; that they have hitherto faithfully performed the duties of their

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office and trust and they are ready and willing to continue so to do. The answer further alleges that while the appellant Thompson is presently residing in the city of New York, yet the relations between the appellants are very close and that they are constantly in communication with each other, as to the best manner in which to carry out their duties and trust; that the said Thompson expects to return to Logan county and make his home there, and that he has not permanently removed from this State.

The cause came on for hearing February 14, 1905, and evidence was then heard by the chancellor in open court. On February 24, 1905, the court appointed Robert Humphrey, guardian *ad litem* for Raynor M., Imogene and Gertrude Talbott, minors, and residuary legatees and devisees under the will of Garrett M. LaForge, and on March 17, 1905, said guardian *ad litem* filed his answer to said petition. No service of process was had on Gertrude M. Talbott, the *cestui que* trust, or her adult daughter, Alma Talbott, or the minors above named.

Thereafter the court entered a decree, finding that by a former decree in said cause it was ordered that said trustees should rent the lands belonging to Gertrude M. Talbott, and pay over to her annually \$720, and after paying the taxes and repairs, should pay the balance of funds in their hands to her creditors. The decree further finds that said trustees had not undertaken to pay the balance of the funds in their hands, after the payment to Gertrude M. Talbott of the amount coming to her and expenses and repairs, to the creditors, and that it was not the intention of said trustees to pay any money to said creditors out of the proceeds of said land; that Harry C. Thompson had removed from the State of Illinois with his family and became a resident of the State of New York and had gone into business there and was not devoting any time or attention to the interests of the estate; that it is for the best interests of the estate of Gertrude M. Talbott and of the creditors under said original decree that a new trustee should be appointed in place of said Thompson. It was, therefore, ordered by the court

that said Thompson be removed as trustee of the lands and property of Gertrude M. Talbott and that Ryan Ginther be and is appointed trustee in place of said Thompson as far as relates to the lands and property of Gertrude M. Talbott, upon his giving bond as such trustee in the sum of \$2,000; that the question of the objections to the reports of said trustees is not passed upon, but is reserved for further hearing; and that said trustees make report of their acts and doings within 30 days. From this decree this appeal is prosecuted.

The petition in this case has no relation whatever to the original proceeding, which was a bill filed by appellants as executors and trustees, to determine the rights of Gertrude M. Talbott under the will of Garrett M. LaForge, deceased, and in certain conveyances therein involved, and to remove the lien of certain judgments as clouds upon the title of the lands held in trust by them, and the cross-bills, in the nature of creditors' bills, of certain judgment creditors of Gertrude M. Talbott. Neither the conduct of appellants as trustees, nor their removal, was there involved.

This petition must, therefore, be held to be an original proceeding, of the pendency of which all parties in interest were entitled to notice by service of process. Gertrude M. Talbott has a life interest in the trust estate, and her children are reversionary legatees and devisees, and, therefore, directly interested in maintaining the integrity of the estate. Whether the present trustees, or either of them, shall be removed, and if so, who shall be appointed to succeed to their duties, are questions of vital interest and importance to the *cestui que* trust and in a proceeding involving their determination the *cestui que* trust is a necessary party. *Butler v. Butler*, 164 Ill., 171.

Absence from the State does not of itself disqualify Harry C. Thompson from acting as trustee under the will of Garrett M. LaForge. *Lill v. Neafie*, 31 Ill., 101. To justify the court in removing Thompson as trustee it is incumbent upon appellees to aver and show that he had been faithless to his trust in the management of the estate; that

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by his negligence, or wilful act, or failure to act, there has been a positive breach of such trust by him.

The averments of the petition in this regard, upon information and belief, that Thompson does not attempt to discharge his duties as trustee and is so situated that he cannot properly discharge such duties, are wholly insufficient. They lack positiveness and are merely the conclusion of the pleader. But admitting the sufficiency of the averments, they are not sustained by the evidence in the record. Appellants' duties, as trustees, are to rent the lands constituting the trust estate, collect the rents, apply the same to the purpose of the trust, and make true reports to the court of the manner in which they have performed such duties. It does not appear that the lands have not been rented; that the rents realized are less than the rental value of such lands; that any of the rents are past due or uncollected; that appellants have failed to make report of their acts in the premises; or that any of the funds coming into their hands have been misappropriated, or disbursed otherwise than is required by the provisions of the will creating the trust.

Appellant, David H. LaForge, testifies that his co-trustee, Thompson, comes to Mason county every year and there remains from four to six weeks; that at such times appellants together discuss and mature plans pertaining to the business of their trust for the year; that when Thompson is absent in New York the trustees are in constant communication with each other with reference to the business of the trust; and that in the conduct of that business the trustees have in fact acted jointly.

A disposition on the part of appellants to so manage the trust estate that there shall be no residue, after the payment of fixed charges, necessary repairs and expenses, to apply upon the judgments of appellees against Gertrude M. Talbott, is not sufficient to justify the court in removing both or either of the trustees. It must appear either that there is a residue in their hands subject to be so applied, or that it is within their power by proper management of the trust estate to realize such residue for that purpose.

The proof shows neither. Appellants filed a report of their acts and doings as such trustees up to March 1, 1902, and the same was approved by the court. They have also filed other reports for the periods ending January 1, 1904, and January 1, 1905, to which objections have been filed, but no hearing had been had thereon prior to the rendition of the decree here involved. *Prima facie* these reports must be taken as presenting a true and correct statement of the receipts and disbursements by the trustees of the trust funds. If, upon a hearing, the court shall find and determine that appellants have not properly executed their trust, and that they have, in their hands, funds subject to be applied upon appellees' judgment, it may make and enforce an order requiring them to make such application.

It is conceded that appellants are financially responsible.

The decree is erroneous for another reason. If it be conceded that Thompson was properly removed, no vacancy was created in the trusteeship. Appellants were appointed trustees jointly. By the common law and by an express provision of the statute, the estate of trustee is held in joint tenancy, and in the absence of a provision in the instrument creating the trust, for the appointment of a successor in case of the death, resignation, or removal of either, the entire trust rests in the survivor. *Golder v. Bressler*, 105 Ill., 419; *Mullanny v. Nangle*, 212 Ill., 247. The appointment of Ryan Ginther was, therefore, unauthorized and void.

The decree of the Circuit Court is reversed.

Reversed.

Central Union Telephone Company v. William T. Gibbons, Administrator.

1. VERDICT—*when set aside as against the evidence.* Where there is no evidence tending to establish the negligence charged in the declaration, a verdict will be set aside.

Action on the case for death caused by alleged wrongful act. Error to the Circuit Court of Macon County; the Hon. WILLIAM

C. U. Telephone Co. v. Gibbons.

C. JOHNS, Judge, presiding. Heard in this court at the May term, 1905. Reversed, with finding of fact. Opinion filed March 20, 1906.

W. B. MANN, for plaintiff in error.

WILLARD J. DICKINSON and I. A. BUCKINGHAM, for defendant in error.

MR. JUSTICE BAUME delivered the opinion of the court.

This writ of error is prosecuted to reverse a judgment of the Circuit Court of Macon county, in favor of defendant in error for \$1,999, for negligently causing the death of his intestate, Thomas Gibbons.

The declaration alleges in substance that plaintiff in error negligently placed or permitted to be placed upon one of its telephone poles an uninsulated electric light wire; that the deceased, a lineman in its employ, was directed by plaintiff in error to climb said pole and dead end a telephone wire on one of the cross-arms; that while so engaged in the line of his duty, and while in the exercise of due care for his own safety, deceased came into contact with said electric light wire carrying a current of 2,000 volts, and was thereby shocked, so that he fell to the ground and was killed.

The telephone pole belonging to plaintiff in error is in an alley between North Water and North Warren streets in the city of Decatur. It is 30 to 35 feet in height, and is provided with iron stirrups or steps driven into its east and west sides at a distance apart on each side of three feet, making a distance of 18 inches between the steps. At a distance of about 25 feet from the ground an iron bracket is attached to the west side of the pole, and to the glass insulator upon this bracket the electric light wire in question is suspended. Above the bracket there are five or six cross-arms, six feet in length, fastened to the pole at a distance of about 14 inches apart. These cross-arms are provided with wooden pins 3 or 4 inches in length, having glass insulators, upon which the telephone wires are suspended. The distance from the lower cross-arm to the iron bracket which carries the electric wire is 4 feet 8 inches. The tele-

phone pole in question accommodated the main toll line wires to Bloomington, Aurora, Clinton and other places, and the uncontradicted evidence tends to show that when the operator at the central office rang out upon one of these lines a current of 50 to 300 volts was created, and that such current is sufficient to shock a person to the extent of causing him to fall from a pole. At the time of the accident, and for some months prior thereto, the electric light wire was practically uninsulated and exposed for a space of several inches on either side of the bracket upon which it was suspended.

On March 20, 1903, the deceased, Thomas Gibbons, was in the employ of plaintiff in error as a lineman and was ordered by the foreman in charge of the work to dead end one of the telephone wires on a cross-arm of the pole. Deceased knew the electric light wire was uninsulated and that it carried a deadly current, and was, upon that day, warned by the foreman to be careful about the electric wire. He ascended the pole by means of the iron steps and was at work on the lower cross-arm when he suddenly fell to the ground and sustained a fracture of the skull, resulting in his death. The evidence tends to show that the deceased when found had a burn on the two smaller toes on one foot; that the little finger of his left hand was burned to the bone, and the next finger was slightly scorched. The evidence further tends to show that it was raining on the day of the accident, and that the pole was wet, rendering the conditions most favorable for the grounding of an electric current.

Counsel for defendant in error say in their brief, "the theory of plaintiff was that when deceased stood on the step on the west side of the pole at or near the bracket holding the light wire, he raised his left foot to the next step above on the east side, and in raising himself on that step, the toe of his right foot touched the light wire; that he was thereby shocked and fell to his death." There is no evidence in the record sustaining this theory. But two witnesses saw the deceased at the time he fell from the pole. Martin Sanders testified as follows: "I noticed him (deceased)

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when he started to fall; he was up in the wires; probably half of his body was up in the wires; his body was half way above the lower cross-arm and he was standing straight up; I couldn't tell from where I was, how far his feet were below the lower cross-arm; I don't suppose his feet could have possibly been more than two and a half feet below the lowest cross-arm; it looked to me like his feet were above the bracket when I saw him; I couldn't tell exactly from where I was. At the time I saw him among the wires it seemed to me like he was standing still and then fell back; I don't think his feet were near the electric light wire."

Samuel Jay testified: "I was first attracted by hearing a groan, and immediately looked, at which I saw somebody up that pole upon which there were six cross-arms and upon which were a good many wires. At the time I was attracted by the groan the man did not do anything but stand still for two or three seconds, then he fell backwards. At the time of falling he was on the north side of the pole, and facing a little to the south and east, almost directly south. He was up to the lower cross-arm and his right foot was nearer to the cross-arm than the electric light wire, and he was in that position from the time I first saw him until he fell back. His right foot was up and his body was scrooched up there in a position, his head being about even with the third cross-arm. He was in a hanging position and appeared to be hanging there. I couldn't tell whether or not he had hold of anything, and without warning he fell back. I saw no change in his position until he fell back. I was right at him."

It is, therefore, established by the evidence that at the time the deceased fell from the pole, half of his body was above the lower cross-arm and half below that cross-arm. He was 5 feet 7 or 8 inches in height. The electric light wire was 4 feet 8 inches below the lower cross-arm. If only one-half, or 2 feet 9 or 10 inches of the body of deceased was below the cross-arm, it is manifest that he was nearly two feet above the electric light wire when he received the shock which caused his fall, and that such shock could not

have resulted by contact with that wire. The only possible explanation of the accident, under the evidence in the record, is, that the deceased was shocked by contact with a telephone toll line wire while the central operator was ringing up a long distance circuit, and that while falling to the ground he came in contact with the electric light wire.

W. B. Bourke, a witness for plaintiff in error, testified as follows: "In operating a telephone business it is necessary to have connection with a dynamo. The wires are charged when they ring on the lines wherever a connection is made between the office and any outside point. Whenever a person being among telephone wires had hold of a bare wire that reached down to the ground, or made a ground, and a person should ring, a shock would be received, depending in strength upon the dynamo, and on a damp day the shock would knock him down. The voltage is from 50 to 300 or 400 when the telephone bell is ringing. Fifty volts are required in ringing local circuits, but in ringing a distance it takes more."

There being no evidence in the record tending to show that the shock which caused the deceased to fall, resulted from contact with the electric light wire, defendant in error has wholly failed to establish that the negligence of plaintiff in error, alleged in the declaration or any count thereof, was the proximate cause of the death of his intestate.

The judgment is reversed, with a finding of fact to be incorporated in the judgment of this court.

Reversed, with finding of fact.

FINDING OF FACT: We find that the negligence of plaintiff in error, alleged in the declaration, was not the proximate cause of the death of Thomas Gibbons.

Kate Shannon, Administratrix, v. The Chicago & Alton Railway Company.

1. **ORDINARY CARE**—*essential to recovery in action for death caused by alleged wrongful act.* In order that the personal representative of one whose death has been caused by the defendant may recover, it is not only essential that the negligence of the defendant as charged in the declaration shall be established, but also that the intestate of such representative shall appear at the time of the accident to have been himself in the exercise of ordinary care.

Action on the case for death caused by alleged wrongful act. Appeal from the Circuit Court of McLean County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

STONE & OGLEVEE, for appellant.

KERRICK & BRACKEN, for appellee; F. S. WINSTON, of counsel.

MR. JUSTICE BAUME delivered the opinion of the court.

This is an action on the case by appellant against appellee to recover damages for negligently causing the death of Thomas P. Shannon. At the close of plaintiff's evidence a peremptory instruction offered by defendant was taken under advisement by the court, and thereupon defendant introduced evidence in its behalf. At the close of all the evidence defendant again offered a peremptory instruction, but the court refused to consider the same, or to consider the evidence introduced by defendant, and gave to the jury the peremptory instruction offered at the close of plaintiff's evidence, and entered judgment against plaintiff for costs and in bar of the action.

The evidence introduced on behalf of appellant tended to show the following facts: On November 26, 1904, the deceased, who had previously made application to appellee for a position as locomotive fireman, received from appellee's superintendent of motive power, a letter, as follows:—

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"The Chicago and Alton Railway Company.

Motive Power Department.

C. E. Fuller, Sup't Motive Power.

Bloomington, Ill., Nov. 26, 1904.

All Freight Engineers, Eastern Division, South:

This will be your authority to allow bearer, T. P. Shannon, applicant for position as fireman, to ride on your engine for the purpose of learning the road and learning to fire an engine.

You and your fireman will please render him such assistance and information as will enable him to become competent to fire an engine. You will please show on the lines below, the engine number and day he fired your engine, together with other information, stating under 'Remarks' whether or not he is competent to fire this engine.

C. E. FULLER,
Sup't Motive Power.

Date	Engine	Train	From	To	Engineer Remarks
.....					
.....					
.....					
.....					
.....					
.....					.."

On November 27, 1904, the deceased, in pursuance of his written authority, got upon a freight engine going south from Bloomington, and rode thereon until the engine reached Lefton, where the deceased left that engine, and boarded engine No. 427, which was hauling a freight train north to Bloomington. Upon presentation of his authority to the engineer of engine No. 427, deceased was told that the engine was steaming poorly, and that he could not fire it; that it was a hard proposition for the regular fireman to do

the duty without a new man doing the work. Deceased then rode on the engine, sitting on the fireman's seat in the cab, until the train reached Ridgley, where it stopped for coal and water. At Ridgley appellee has two main tracks running north and south, the east track being the north-bound track, and the west track the south-bound track. Water is supplied to locomotives by a large tank on the west of the west track and two stand pipes, one on each side of the two tracks. Coal is stored in an elevator located on the east side of the north-bound track. The standpipe and elevator are each 31½ feet from the east rail of the east track. The standpipe is about 18 feet high and is equipped with an arm or crane that is turned over the opening in the engine tank when taking water and is turned back parallel with the track when not in use. There is also a lever near the base of the standpipe that is used to turn the crane in position when it cannot be reached from the tender of the engine. When the engine stopped at the standpipe, Craig, the regular fireman, went back over the tender to take water, and shortly thereafter the deceased also came from the cab onto the tender and asked Craig if there was anything he (deceased) could do. Craig told deceased to get down and turn the water crane around so that the engine could be moved up to take coal. Deceased then jumped from the tender to a car of slack just behind the tender and from there reached the ground on the east side of the track, and by means of the lever properly turned the crane so it cleared the track. Craig then proceeded to take coal, and did not again see deceased until the latter was found dead on the west side of the north-bound track. The evidence tends to show that immediately after he had turned the crane in position, deceased must have climbed between two cars back of the engine for the purpose of going on the west side of the track, and when he reached the west side or was attempting to cross the south-bound track he was struck by the locomotive of a passenger train going south at a speed of from 30 to 50 miles an hour.

The declaration contains five counts. The first count alleges that deceased was a student learning the duties of a fire-

man on the road of appellee, and as such was under the care and instruction of the engineer and fireman of engine No. 427, and that it was their duty to warn him of the dangers incident thereto, which they knew and which were unknown to deceased; that the engineer and fireman were guilty of negligence in sending deceased to turn the crane without giving him warning of the dangers attending his return to the engine, and that as a direct result of such negligence deceased was killed, while in the exercise of due care for his own safety. The second count charges that deceased was a student fireman, rightfully upon the right of way of appellee and that he was killed while in the exercise of due care for his own safety by the negligence of the servants of appellee having charge of the passenger train in not giving some sufficient warning of its approach. The third count alleges that deceased was a passenger and was killed by the negligence of appellee in running the passenger train. The fourth count alleges that deceased was in the employ of appellee, and that he was killed by its negligence as charged in the second count. The fifth count alleges that deceased was in the employ of appellee, and that he was killed by its negligence as charged in the first count.

The trial court having refused to consider appellee's motion for a peremptory instruction made at the close of all the evidence, and having sustained such motion as made at the close of appellant's evidence, the only question involved is whether or not the evidence for appellant with all the inferences that may justifiably be drawn therefrom is sufficient to support a recovery.

It may be conceded that the relation of the deceased to appellee was neither that of a trespasser nor bare licensee. Whether the deceased in his relation to appellee be held to have been a licensee by invitation or an employee, it was incumbent upon appellant to show that he was, at the time of his death, in the exercise of due care for his own safety and that appellee was negligent in one or more of the respects alleged in the declaration and that such negligence was the

proximate cause of his death. I. C. R. R. Co. v. Eicher, 202 Ill., 556.

If it be conceded that the relation of fellow servants did not exist as between the deceased and the engineer and fireman of engine No. 427, we cannot conceive upon what theory appellee could be held guilty of negligence in the failure of its fireman and engineer to notify deceased that a passenger train was due to go south on the west track, at or about the time engine No. 427 stopped for coal and water. Deceased, in turning the crane of the standpipe on the east side of the track, was in a place of absolute safety as regards the passenger train, and he could have returned to his place in the cab of the engine by the route he took to reach the standpipe, or by going between the standpipe and elevator, and the train, either of which would have been free from danger. There was no occasion for his going between the cars to the west side of the train on the south-bound track and neither the engineer nor fireman could have anticipated that he would do so. He so went voluntarily and without the line of his duty. Deceased must be held to have known that the south-bound track was a place of danger, and in approaching that track or attempting to cross it, it was his first duty in the observance of ordinary care for his own safety to ascertain if a train was approaching. His view of the track to the north was unobstructed and no conditions existed that excused his failure to observe the train.

While there was no duty on the part of the servants of appellee in charge of the passenger engine, either by statute or because of known or apprehended danger, to give warning signals as the passenger train approached the place of the accident, the evidence shows that the whistle was sounded a sufficient length of time before the deceased was struck, to have enabled him, in the exercise of ordinary care for his own safety, to escape unhurt, and there is no evidence to the contrary.

It is urged that the court erred in refusing to allow the witness John Lombardo to answer the question, "Do you know how Joe Allen came by his death"? Also in sustain-

ing appellee's objection to the offer by appellant to prove by that witness, "that on February 3, 1904, one Joe Allen was killed by being struck by a passenger train south-bound, while standing by the side of an engine on the north-bound track at the water and coaling station north of Ridgley, at the place of this accident." The evidence was incompetent in any event (*Mobile & Ohio R. R. v. Vallowe*, 214 Ill., 124), but if appellant's theory that it was competent for the purpose of showing that appellee had notice of the dangerous character of the place, be conceded, the offer did not disclose facts identical with those in the case at bar.

The witness John Power testified that he saw the engine strike deceased, and the court, therefore, did not err in not permitting appellant to show the habits of deceased with reference to care and caution for his own safety.

In the absence of evidence tending to prove that the deceased was in the exercise of due care for his own safety, and that appellee was negligent, the peremptory instruction was properly given, and the judgment will be affirmed.

Affirmed.

T. H. Downing v. John L. Kirkpatrick, et al.

1. PROPOSITIONS OF LAW—*effect of failure to present*. In a case tried by a court without a jury, a failure to present propositions of law to be passed upon by the court leaves no questions of law to be determined on review except such as may arise upon the rulings upon the evidence and from the pleadings.

Action of trover. Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

SWITZER & MILLER and CHARLES W. FLACK, for appellant.

VOSE & CREEL, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

Oldham v. Howser.

July 29, 1904, Llewellyn Danielson executed a chattel mortgage to appellant upon "one bull, 2 years old," and certain other personal property to secure the payment of a note for \$1300. October 1, 1904, Danielson sold said bull to Harry Knight and on February 2, 1905, appellees purchased said bull at a public sale of Knight's personal property for \$33.25. This is a suit in trover by appellant against appellees to recover the value of the bull. The case was tried by the court without a jury and there was a finding and judgment in favor of appellees.

No propositions of law were presented to the court upon the trial of the case, and the only question for our determination on this appeal arises upon the facts.

A preponderance of the evidence in the case tends to show, and the court was warranted in finding, that appellant expressly consented to the sale of the bull by Danielson to Knight; that appellant knew of the purchase of the bull by Knight and Knight's subsequent possession of the bull; that appellant made no demand upon Knight for the bull or for its purchase price, and that appellant had notice of the public sale of Knight's personal property. Upon this state of facts the trial court could not have done otherwise than find the issues for appellees, and the judgment predicated upon such a finding must be affirmed.

Affirmed.

J. G. Oldham v. Christopher L. Howser.

1. REAL ESTATE COMMISSIONS—*when broker entitled to.* Where a broker has been authorized to sell real estate and furnishes to the owner a customer ready, able and willing to complete the purchase, he is entitled to his commissions.

Action of assumpsit. Appeal from the Circuit Court of Champaign County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the November term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

RAY, DOBBINS & RILEY, for appellant.

MILLER & SPURGIN and JOHN J. REA, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellant, a real estate broker, against appellee to recover a commission alleged to be due appellant. At the conclusion of all the evidence the court instructed the jury to find the issues for the defendant, and judgment was rendered against appellant on the verdict so returned.

The evidence introduced on behalf of appellant tended to show that on December 21, 1904, appellee listed his farm of 246 acres with appellant for sale at \$165 per acre, a reasonable amount to be paid down and the balance to be paid March 1, 1905; that appellant was to be paid a commission of \$1.00 per acre, and was to have 10 days in which to find a purchaser; that upon the following day, December 22, 1904, appellant procured John F. White and William Jones, who were ready, able and willing to purchase the land upon the prescribed terms; that appellant then introduced the intending purchasers to appellee and requested him to consummate the sale, but he declined and refused so to do. The evidence introduced on his behalf made a *prima facie* case for appellant and entitled him to recover the commission claimed. *Monroe v. Snow*, 131 Ill., 126; *Scott v. Stuart*, 115 Ill. App., 535; *Whalen v. Gore*, 116 Ill. App., 504; *Lemon v. Carter*, 116 Ill. App., 421.

Evidence was introduced on behalf of appellee contradictory of that offered on behalf of appellant, but it was not within the province of the trial court, acting upon a motion to direct a verdict, to weigh the evidence and determine the issue of fact involved. In *Woodman v. Ill. Trust and Savings Bank*, 211 Ill., 578, the court, in speaking of a motion to direct a verdict, stated the correct rule to have been announced in *Frazer v. Howe*, 106 Ill., 563, as follows: "It is not within the province of the judge, on such a motion, to weigh the evidence and ascertain where the preponderance is. This function is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed,—*i. e.*, evidence from which, if credited, it

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may reasonably be inferred, in legal contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence."

For error in giving the peremptory instruction the judgment is reversed and the cause remanded.

Reversed and remanded.

M. H. Stubblefield v. Seymour Ayers, et al.

1. VERDICT—*when not disturbed*. A verdict clearly sustained by the preponderance of the evidence will not be disturbed on review.

Action commenced before justice of the peace. Appeal from the County Court of DeWitt County; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

JOHN FULLER, for appellant.

HERRICK & HERRICK, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit by appellees against appellant to recover \$26.54 alleged to be due appellee Ayers and D. E. Arthington for labor in cutting 26,543 feet of logs at \$1.00 per 1000 feet. Upon the trials before a justice of the peace and in the County Court appellees recovered judgments for the amount claimed.

The evidence introduced on behalf of appellees tends to show that appellant contracted with appellee Ayers for the cutting of logs by Ayers and D. E. Arthington at \$1.00 per 1000 feet; that the logs were cut in pursuance of the contract; and that appellant repeatedly promised to pay for the work done. It is conceded by appellant that the logs belonged to him and that Ayers and Arthington cut the logs, but it is claimed that the contract to cut the logs was made with Ayers alone, by one Humphrey, an employee of appellant; that appellant is not liable upon the contract; and that

in any event a recovery cannot be had against appellant by Ayers and Arthington jointly. While there is a conflict in the evidence, it so clearly preponderates in favor of appellees that no verdict and judgment other than that entered in this case could be permitted to stand.

There is no error in the record and the judgment is affirmed.

Affirmed.

Daniel Blackstone v. William H. Ragan.

1. SURVIVING PARTNER—*what may be recovered by.* A surviving partner in a single action may recover demands due him individually as well as demands due him as surviving partner.

Action commenced before justice of the peace. Appeal from the Circuit Court of Shelby County; the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

RICHARDSON & WHITAKER, for appellant.

CHAFEE & CHEW and GEORGE B. RHOADS, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a suit originally commenced before a justice of the peace by Anthony Thornton and William H. Ragan, partners, against appellant, to recover \$200 claimed to be due for legal services. There was a judgment against appellant for that amount before the justice, from which he took an appeal to the Circuit Court. Pending the appeal in the Circuit Court, the death of Anthony Thornton was suggested, and William H. Ragan was given leave to prosecute the suit as surviving partner. The trial in the Circuit Court resulted in a verdict and judgment against appellant for the amount claimed.

On behalf of appellee, plaintiff below, evidence was introduced tending to show that in April, 1897, appellant consulted William H. Ragan professionally regarding threat-

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ened bastardy proceedings against appellant's son; that Mr. Ragan then charged upon his books against appellant a retainer fee of \$100; that appellant's son soon after being arrested married the young woman involved and immediately thereafter left the State; that from April, 1897, to 1898 appellant frequently consulted and advised with Mr. Ragan in relation to his son's troubles; that in 1898 Mr. Ragan entered into partnership with Anthony Thornton, and thereafter until the winter of 1900 and 1901, appellant continued his consultations with the firm of Thornton & Ragan; that appellant recognized his indebtedness to the firm and frequently promised to pay the same; that \$200 was a reasonable charge for the character of services rendered by appellee and the firm of Thornton & Ragan.

On behalf of appellant there is evidence tending to show that Mr. Ragan denied that he had any claim against him for legal services and stated that as the matter had not come to suit, no charge would be made.

Appellant claimed an off-set of \$150 for money paid to appellee because of alleged threats by the latter to institute a suit against appellant for slander, but the receipt given for that amount by appellee to appellant shows that the money was paid in settlement for alimony allowed the wife of appellant's son in her suit for divorce on the ground of desertion.

Upon the issues of fact involved the verdict of the jury must be held to be decisive in this case. While the evidence is conflicting, we think it abundantly supports the verdict.

It is insisted by appellant that as the legal services involved were rendered in part by Mr. Ragan individually and in part by the firm of Thornton & Ragan, appellee, as the surviving partner of that firm, cannot recover the entire amount in this suit.

"In the case of a survivor of several contracting parties a demand due him as survivor may be joined with a demand due to him from the party in his own right; and a debt due to the defendant, as a surviving partner may be set off

against a demand on him in his own right, and *vice versa*. By the death of the co-partner the debt is considered to be owing to him in his own right, and so is not subject to the objection that it is a demand held in *autre droit*. The fact that the rights are derived from different titles is of no moment." *Harris v. Pearce*, 5 Ill. App., 622, and cases cited. Appellant recognized the principle above stated by filing his claim against William H. Ragan as a set-off to the demand sued for.

Moreover there is evidence in the record tending to show a contract of novation, whereby the amount due from appellant to William H. Ragan was taken by the firm of Thornton & Ragan, to which firm appellant promised to make payment.

Other objections are urged, but we do not consider them of sufficient moment to justify discussion. The judgment is affirmed.

Affirmed.

Hickory Grove Drainage District v. Mason & Tazewell Special Drainage District, et al.

1. DOMINANT LAND—*what not within right of owner of*. The owner of the dominant land has no right to remove a natural barrier or watershed and thereby cause to flow upon the servient land water which would not otherwise naturally flow thereon.

Injunctional proceeding. Appeal from the Circuit Court of Tazewell County; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the May term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

W. W. HAMMOND and W. R. CURRAN, for appellant.

JESSE BLACK, JR., and WILLIAM A. POTTS, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

December 1, 1904, appellant, the Hickory Grove Drainage District, filed its original bill against appellees, the

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Mason and Tazewell Special Drainage District and the commissioners of said district, for an injunction restraining appellees from entering upon certain territory within the boundary of appellant district with a dredge boat for the purpose of enlarging a ditch belonging to appellee district, and from connecting the same with a ditch belonging to appellant. Upon the filing of the bill a temporary injunction was granted, and on December 6, 1904, appellee district filed its answer to the original bill together with affidavits in support of such answer, and also its motion to dissolve the injunction. December 9, 1904, appellant filed its amended bill in the cause together with affidavits in support thereof, and on the day following appellee district filed its answer to such amended bill. The motion to dissolve the temporary injunction was heard by the chancellor upon the original and amended bills, the answers thereto, and affidavits in support of said bills and answers, and certain accompanying exhibits, and upon consideration thereof a decree was entered dissolving the injunction and dismissing the bill for want of equity.

Appellant district was organized July 6, 1882, under the drainage laws of 1879, and its southerly boundary is the south line of section 26, town 23, N. R. 6 W., in Tazewell County. Appellee district was organized in December, 1882, under the drainage laws of 1879, and includes lands lying south of the south line of said section 26. The north boundary line of appellee district being the south boundary line of appellant district. The lands in appellant district are generally lower than the lands in appellee district and the natural drainage of appellant district and of a portion of appellee districts is to the north. Soon after its organization appellant constructed its main ditch, 30 feet wide and 10 feet deep, beginning at a point near the center of section 26 and running north to Mackinaw creek where it discharged.

Appellee district, in 1883, constructed a ditch 27,000 feet in length known as the north Quiver ditch, commencing at the center of section 26, in conjunction with the main ditch of appellant, and running thence south to the south line of

section 26, thence southwesterly through the northwest quarter of section 35, thence southwesterly through sections 34, 4, 8 and 7 to its junction with the main Quiver ditch. The portion of the ditch of appellee district in section 26, being within the territory of appellant, was constructed in the first instance by virtue of a judgment in condemnation proceedings, whereby appellee district acquired a right of way 60 feet in width in the southwest quarter of said section.

February 21, 1884, appellant filed its bill in the Circuit Court of Tazewell county against appellee district and certain contractors, to enjoin the construction of the north Quiver ditch and its connection with the ditch of appellant in section 26, upon the alleged ground that the construction of said ditch by appellee district and its connection with the ditch of appellant would drain into appellant's ditch a large volume of water from lands lying outside of appellant's district, the natural drainage of which lands was in a southwesterly direction. During the pendency of that suit, a settlement of the matters therein involved was arrived at between the commissioners of the respective drainage districts, and a written agreement embodying the terms of such settlement was executed by such commissioners. The written agreement being lost, recourse must be had to parol evidence to ascertain its terms, and it is established by such evidence that by the terms of said written agreement appellee district was permitted to connect its north Quiver ditch carrying the natural watershed with the ditch of appellant in section 26, upon condition that the appellee district would protect appellant from the increased flow of water, fill or otherwise on account of such connection, by cleaning appellant's ditch at the expense of appellee district.

North Quiver ditch as enlarged by appellee district to the south line of section 26, in accordance with the specifications therefor in evidence, is 12 feet in width at the bottom throughout its entire length, and has a slope of 1 to 1 on the sides. This enlargement of said ditch has also necessitated its deepening from 2 to 6 feet throughout its entire length. It must be conceded upon the evidence in this record that the

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extension of north Quiver ditch northward into section 26 and its connection at that point with the ditch of appellant, in accordance with the plans and specifications thus far adhered to and proposed to be carried out, will result in deflecting into the main ditch of appellant a much larger volume of water from the territory of appellee district than appellant's ditch has heretofore carried, and it may be conceded that if the natural drainage of all the lands in appellee district is toward appellant's ditch, and such increased flow of water is caused solely by the enlargement of a natural channel, and not by the removal of a natural barrier or watershed, whereby water not naturally flowing from the lands in appellee district into appellant's ditch will be caused to flow therein, appellant is bound to receive such increased flow of water, and is without remedy in the premises. *Kankakee Drainage District v. Com's of Lake Fork Drainage District*, 130 Ill., 261.

But appellee district, although the lands within its boundary are the dominant lands, has no right to remove a natural barrier or watershed, and thereby cause to flow upon the servient lands in appellant district water which would not otherwise naturally flow thereon. *Dayton v. Drainage Com's*, 128 Ill., 271.

Appellant contends that there is a natural barrier or watershed in appellee district near the south line of section 34, at a point about 8,000 feet southwest of the south line of section 26, and that at that point in north Quiver ditch there is a divergence in the natural flow of the water to the northeast and southwest, while appellees contend that such natural barrier or watershed is at a point in the southwest corner of section 4, 15,000 feet southwest from the south line of section 26.

We think a preponderance of the evidence in the case tends to show that the natural barrier or watershed is at or near the Spaitz road, near the south line of section 34, about 8,000 feet southwest of the south line of section 26.

In its answer to the original bill, appellee district alleged that the natural slope and surface drainage of its lands was

divided by a watershed, the highest point of which was near the south line of section 34. W. H. Cogdal, William C. Hall, Stephen Mahr, John Marshall, Henry Gumbel, J. L. McWilliams and James Hobkirk, whose affidavits were filed by appellees on the hearing of the motion to dissolve the temporary injunction, state that the watershed is near the center line of section 34, and the affidavit of Hobart Hamilton, a civil engineer employed by appellee district, is to the same effect. Furthermore, it appears that at a meeting of the commissioners of the two drainage districts, held for the purpose of settling, if possible, the litigation pending in 1884, the commissioners of appellee district proposed to turn over to appellant the portion of their district lying north of the Spaitz road. We think this proposition was a clear recognition by appellee district of the fact that there was a watershed in its district at or near the Spaitz road, and this view is confirmed by an examination of the profile of north Quiver ditch as it was constructed in pursuance of the written agreement heretofore referred to, which profile discloses that the bottom of the ditch was highest near the Spaitz road, and that the water there diverged to the northeast and southwest.

Assuming, however, that the natural watershed is in the southwest quarer of section 4, as contended by appellees, it is uncontroverted that north Quiver ditch as now enlarged will divert the flow of water therein from the southwest into the main ditch of appellee district to the northeast into the main ditch of appellant, from a point near the center of section 8, which is more than half a mile southwest of the watershed as located by appellees. Thus, according to its own contention, appellee district proposes to drain into the main ditch of appellant, surface water from one-half mile of territory within its district, which would naturally flow into its own main ditch. This, appellee district may not do, and appellant is entitled to relief by injunction to prevent it.

It is insisted by appellees that appellant has a complete remedy at law under the contract heretofore mentioned, entered into between the commissioners of the respective drainage districts. That contract, by its terms, only contem-

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plated a connection of the ditch of appellee district with appellant's ditch for the carrying of water within the natural watershed, which, as we have heretofore stated, must have been understood by the parties as extending only to the Spaitz road. The contract did not contemplate an enlargement of the north Quiver ditch in accordance with the plans and specifications adopted by appellee district ten years later, whereby two miles of additional territory lying southwest of the Spaitz road would be drained into appellant's ditch.

It is also urged on behalf of appellees that about two months prior to the granting of the temporary injunction in the case, and while the dredge boat was engaged in enlarging north Quiver ditch, one of the commissioners of appellant district was notified by representatives of appellee district, in charge of the work, that the ditch was to be enlarged and deepened in accordance with the plans and specifications; that appellant thereby had notice of the intention of appellee district to connect such enlarged ditch with the main ditch of appellant, and appellant, not having then objected to the further prosecution of the work, is equitably estopped to enjoin the connection of the two ditches.

If the doctrine of equitable estoppel could be invoked by appellees in this case, the facts in evidence do not justify the application of the doctrine. The only evidence tending to support the contention of appellees in that regard is that of W. L. Prettyman, who states in his affidavit that while the dredge boat was at work in north Quiver ditch, in the southwest quarter of section 4, Henry Dix, one of the commissioners of appellant district, was notified by the men in charge of the dredge boat that they would cut to a depth of 6 feet deeper for a distance of some 6,000 feet to the north. At most this only amounted to notice to Dix that the dredging would be continued to the Spaitz road, which was about 6,000 feet north of the southwest quarter of section 4, and entirely within the natural watershed to the southwest as claimed by appellant. Appellant is not here complaining of the work done by appellee district within the natural water-

shed to the southwest, but of the continuation of that work through such natural watershed, whereby surface water naturally flowing to the southwest will be caused to flow to the northeast.

The decree of the Circuit Court is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

MR. PRESIDING JUSTICE PUTERBAUGH took no part in the decision of this case.

George Rader v. William Huffman.

1. STATUTE OF FRAUDS—*when lease within*. A verbal lease which is to run for a longer period than a year is within the Statute of Frauds.

2. ELECTION—*conduct may constitute*. A tenant who remains in possession after he has been told by his landlord that he must rent the premises covered by his old lease if he would rent at all, elects to remain under such old lease.

Distress for rent. Appeal from the Circuit Court of Vermillion County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

SALMANS & DRAPER, for appellant.

W. M. ACTON, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court

This is a proceeding by distress for rent by appellee against appellant to recover \$188.60 rent for 40 acres of land. The trial court directed a verdict for appellant.

Appellant was a tenant of appellee under a written lease of 200 acres of land, for the term of one year beginning March 1, 1903, and ending March 1, 1904.

On April 6, 1904, appellant and appellee met for the purpose of executing a written lease for the year beginning

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March 1, 1904, and ending March 1, 1905. Appellant then said he did not want to rent 40 acres of the 200 he had farmed the previous year, but would take 160 acres. Appellee replied that he would not rent 160 acres unless appellant took the 40 acres also, and that he (appellee) would not consider it rented unless appellant took the 40 acres just as he had the year before. Appellant said he would move off and give up the farm before he would take the 40 acres, and appellee replied, if he (appellant) wanted to move he could do so, and that he (appellee) would take possession of the whole farm, but would not take possession of the 40 acres alone. Appellant thereafter remained on the place but did not farm the 40-acre tract.

Appellee claimed that in September, 1903, he told appellant he would rent the 160 acres for the year beginning March 1, 1904, but would not take the 40 acres, and that appellee replied, "All right."

Appellant sought to introduce proof of the conversation with appellee in September, 1903, but the court sustained an objection thereto, and this ruling of the court is the only matter seriously urged by appellant for a reversal of the judgment.

As appellant's tenancy under the written lease terminated March 1, 1904, if he held over for another year after that date, he must have done so either under the written lease, or under some other valid contract of leasing constituting a new tenancy. The alleged verbal contract of September, 1903, for the leasing of the 160 acres for a term commencing March 1, 1904, and ending March 1, 1905, was clearly within the Statute of Frauds, and the court did not err in sustaining appellee's objection to the evidence offered. *Wheeler v. Frankenthal*, 78 Ill., 124; *Cooney v. Murray*, 45 Ill. App., 463.

Appellant was explicitly told by appellee on April 6, 1904, that he must rent the whole 200 acres, or none, and appellant, having elected to remain on the premises after that date, must be held to have done so under his written lease of the entire premises. *Griffin v. Knisely*, 75 Ill., 411.

The judgment is right and will be affirmed.

Affirmed.

Frank H. Meyer v. City of Decatur.

1. *DRAM-SHOP—how city's power to license, must be exercised.* A city's power to license or to refuse to license dram-shops can only be exercised through general ordinances operating uniformly upon all persons of the class to which the ordinances relate.

2. *DRAM-SHOP—refusal to license, cannot be predicated upon mere whim.* A city cannot reserve by ordinance or exercise an arbitrary power with respect to the issuing or the refusing of a dram-shop license.

3. *MANDAMUS—when writ of, to compel issuance of dram-shop license, will not be issued.* Unless it is made clearly to appear that the petitioner has complied with all the requirements of the ordinance relating to the granting of dram-shop licenses, he is not entitled to the writ of *mandamus* in the event of a refusal to grant such license.

Mandamus proceeding. Appeal from the Circuit Court of Macon County; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

C. E. SCHROLL, for appellant.

W. NOY BOGGESE, for appellee.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a proceeding by Frank H. Meyer, appellant, against the city of Decatur, appellee, to compel the city council of said city to forthwith approve an application by appellant to said city for the issuance to him of a license to keep a dram-shop and to require appellee to issue to him such license. To appellant's petition for a peremptory writ of *mandamus* appellee interposed its demurrer, which was sustained by the court, and appellant electing to abide his petition, judgment was entered against him in bar of the action.

The portions of the ordinances of the city of Decatur relating to the licensing of dram-shops, here involved, are as follows:

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"3. License — Fee — Bonds, Etc. The city council may in its discretion grant license for a term not less than three months nor exceeding one year to such person or persons as may apply therefor, to retail intoxicating liquors, upon such person or persons paying into the city treasury the sum of one hundred and twenty-five dollars for three months, or five hundred dollars for one year, and executing a bond to the city of Decatur in the penal sum of one thousand dollars, signed by at least two good and sufficient securities, freeholders of the city, which bonds shall be approved by the city council before license issues. * * * Said applicant or applicants shall also, before license shall be issued, give bond in the sum of three thousand dollars, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county of Macon to be approved by the city council conditioned that he will pay to all persons all damages that they may sustain either in person or property or means of support, by reason of the person so obtaining the license selling or giving away intoxicating liquors, * * * and provided further, that all licenses granted under the provisions of this ordinance shall begin and expire either on the ninth day of August, November, February, or May, and no license shall be granted to extend beyond the municipal year in which it shall be granted; Provided, the city council shall reserve the exclusive right to be the sole judge to whom license shall issue and to limit the number of licenses to be issued.

"4. Notice of Application in New Place. That no license shall hereafter be issued to any person or persons to retail malt or intoxicating liquors in any room or place not immediately heretofore used as a dram-shop, unless the person or persons applying for the same shall have first published for two weeks successively, in some daily newspaper published in the city, his or their intention of making application to the city council at its next regular meeting thereafter for said license, designating the house in which he or they intend carrying on said business, and the lot on which said house is situated, and the block and addition in which said lot is located; which said notice shall be in the following form as nearly as may be:" (Here follows form of notice.)

By section 1 of another ordinance it is provided that all that portion of the city of Decatur lying without certain territory therein, particularly described, shall be known and treated as a prohibited district within which it shall be unlawful to issue a license to keep a dram-shop.

The petition alleges that on August 14, 1904, appellant filed with the city clerk of the city of Decatur for approval a certain legal bond in the sum of \$3,000, to the People of the State of Illinois, and that the persons whose names are subscribed to said bond are each and all freeholders of Macon county and are good and solvent sureties, worth at least \$15,000 over and above all liabilities and exemptions. The bond is set up *haec verba* and bears date August 14, 1904. It recites that appellant desires to keep a dram-shop in the city of Decatur for the full term of one year from the day of, and makes application for the issuance to him of a license therefor for the first three months of said term of one year, said three months commencing on the day of and ending on the 9th day of November, 1905.

The petition further alleges that on the day of August, 1905, appellant filed with said city clerk a certain other legal bond for the sum of \$1,000 to the city of Decatur, which is also set up in full and which contains the same recitals with reference to the time of the commencement and termination of the obligation as the other bond.

The petition further alleges that on the day of August, 1905, appellant presented to the city council his petition in due form for the issuance to him of a license to keep a dram-shop; that said petition was not acted upon at the meeting at which it was presented, but action was postponed until August 28, 1905, when said petition was refused by said city council; that on September 5, 1905, appellant made a demand in writing upon said city council to issue to him a dram-shop license in pursuance of his application therefor; that the bonds presented by him were duly approved by the city clerk of said city and that said city clerk accepted \$125 as and for appellant's license fee, and

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that the money so paid has not been refunded to appellant, nor has appellant asked that it be refunded to him; that the said city clerk and said city council refused and still refuse the petition and demand of appellant to conduct a dram-shop, without any good and sufficient reason; that appellant is a man of good moral character; that at various meetings of the city council from and after August 9, 1905, about sixty licenses were granted to different persons in the city of Decatur, and three persons were granted licenses in the same street and block wherein appellant applied for a license; that there have been for years four licensed saloons in said block and there are three licensed saloons in said block operating under licenses granted by said city at or about the time appellant applied for his license; that the premises in which appellant has applied for a license to keep a dram-shop is not within the prohibited district established by the ordinance of said city; that appellant before making application to the city council for a license published a notice for the period of two weeks successively in a daily newspaper published in said city, as required by the revised ordinances of said city; that the application and demand of appellant is refused without any reason being assigned therefor and such refusal is unreasonable and arbitrary and an unjust and illegal discrimination against appellant and in favor of other applicants, and is promoted by caprice and favoritism.

By virtue of the legislative grant of power the city council of the city of Decatur is authorized to license, regulate and prohibit the selling or giving away of intoxicating liquors, but the power so granted can only be exercised through general ordinances operating uniformly upon all persons of the class to which the ordinance relates. *City of East St. Louis v. Wehrung*, 46 Ill., 392; *Zanone v. Mound City*, 103 Ill., 552; *People v. Cregier*, 138 Ill., 401. It is not doubted but that an ordinance may be enacted limiting the number of dram-shops to be licensed, prescribing certain prohibited districts, and determining the terms and conditions upon which such licenses shall be granted, but the city council may

not by ordinance reserve to itself an arbitrary discretion to license one person and refuse to license another having like qualifications, through mere caprice or favoritism.

The ordinance must prescribe certain fixed rules and regulations whereby its impartial enforcement can be secured. *People v. Cregier, supra*; *Cicero Lumber Co. v. Cicero*, 176 Ill., 9; *Noel v. People*, 187 Ill., 587.

The provision in section 3 of the ordinance reserving to the city council the exclusive right to be the sole judge to whom license shall issue, is merely the reservation of an arbitrary discretion subject to be exercised through considerations of caprice and favoritism and must be held to be discriminatory and illegal. It is clearly distinguishable from the ordinance enacted by the village board of Hyde Park reserving to the board a discretion to determine the number of dram-shops the public good required. *People v. Cregier, supra*. The further provision in the same section, reserving to the city council the right to limit the number of licenses to be issued, is merely declaratory of a right vested in the city council by the legislature. Such right can, however, only be exercised through an ordinance fixing the number of licenses to be issued, or providing some uniform method by which the number shall be determined.

It is said that the ordinance is not mandatory upon the city council in regard to the issuing of licenses, and the language of the ordinance, "The city council may in its discretion grant license," etc., is quoted in support of such contention. If the city council had refused to issue licenses to any person or persons, it may be doubted whether it could be compelled to issue a license to a person complying with all the requirements of the ordinance, but having exercised such discretion in favor of the issuing of licenses to certain persons, as is alleged in the petition, the ordinance should be held to be mandatory upon the city council to issue licenses to all persons complying with its provisions.

It is elementary that the remedy by *mandamus* can only be invoked where the relator sets forth and establishes a

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clear right to coerce the respondent to do the thing sought to have done.

It will be observed that the ordinance provides that all licenses granted thereunder shall begin and expire either on the ninth day of August, November, February or May. Appellant did not file his application for license with the city clerk until August 14, 1905, being five days after the date fixed by the ordinance for licenses granted thereunder to begin, and the bond then filed by applicant was defective in that it failed to state when the year during which he desired to keep a dram-shop, or the first three months for which license was to be issued, was to begin. The petition also fails to allege the date upon which the bond for \$1,000, payable to the city of Decatur, was filed with the city clerk, and it does not appear whether said bond, the filing of which is a prerequisite to its approval and the granting of a license, was filed before or after appellant's application for a license was presented to the city council. The bond last mentioned is also defective in the same particulars as the bond alleged to have been filed on August 14th. Furthermore, it does not sufficiently appear that the notice of appellant's intention to apply for a dram-shop license which the petition alleges was published for the period of two weeks successively before making application for the license, was in conformity with the requirements of section 4 of the ordinance. The allegation of the petition in that regard is merely the conclusion of the pleader.

It not sufficiently appearing from the allegations of the petition that appellant has complied with all the requirements of the ordinances relating to the granting of dram-shop licenses, he has failed to show a clear right to the relief prayed, and therefore the demurrer to the petition was properly sustained. The judgment of the Circuit Court is accordingly affirmed.

Affirmed.

Jessie Stone, et al. v. Helen Juvinall, et al.

1. **MECHANIC'S LIEN**—*when claim for, must be filed where work done or material furnished has been pursuant to implied contract.* Where work is done or material is furnished pursuant to an implied contract, each separate item of work done or material furnished constitutes a separate claim and while the aggregate of such claims may be included in a single claim for lien, yet such claim for lien must be filed within four months after the performance of the first item of work or the delivery of the first item of material.

Mechanic's lien proceeding. Appeal from the Circuit Court of Vermillion County; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

BUCKINGHAM & DYSERT, for appellants.

REARICK & MEEKS, H. M. STEELY, O. M. JONES and W. M. ACTON, for appellees

MR. JUSTICE BAUME delivered the opinion of the court.

In their amended bill for a mechanic's lien, appellants allege that on September 1, 1903, appellee, Helen Juvinall, through her husband, D. M. Juvinall, entered into a contract with appellants, by the terms of which appellants were to furnish material and supplies to be used in building certain corn cribs, houses, out-houses, fences and other improvements on certain described real estate in which appellee, Helen Juvinall, had a life estate; that said material and supplies were to be furnished at such time and in such quantities as said D. M. Juvinall should direct, and that appellants were to be paid what such material and supplies were reasonably worth; that appellants actually furnished and delivered to the agents of Helen Juvinall a large quantity of material and supplies for the purpose of being used in said construction and improvements, and that such material and supplies were reasonably worth \$655.53, and that amount

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remains due and unpaid; that on August 9, 1904, being within four months from the date of the furnishing of said material and supplies, appellants filed in the office of the clerk of the Circuit Court of Vermilion county a verified statement of their claim, etc.

Upon the filing by appellees of their several answers to the bill, the cause was referred to a special master to take proofs and report his conclusions of law and fact. The special master filed a report wherein he recommended that a decree be entered in accordance with the prayer of the bill, and the cause was thereafter heard by the chancellor upon appellees' exceptions to said special master's report and said exceptions were sustained and a decree entered dismissing the bill for want of equity.

Considering the evidence in the record most favorable to appellants, it discloses that on September 1, 1903, they contracted with D. M. Juvinall on behalf of his wife, Helen, to furnish the material necessary for the construction of a machine-shed about 70 feet long, a cattle-shed, a crib or two, and to repair scales and fix up an old crib, all on real estate in which Helen Juvinall had a life estate. The evidence also strongly tends to show that all of the work contemplated and included in the contract for material was fully completed by February 1, 1904.

The claim filed by appellants and upon which they predicate their right to a mechanic's lien embraces various items of material furnished and delivered from time to time from September 1, 1903, to May 17, 1904. The last three items of the claim, being as follows:

April 12, 1904, 1 M. No. 1 W. C. shg.....	2.00
April 27, 1904, 750.....	1.50
May 17, 1904, 1½ bbl. lime.....	.60

The rights of other creditors, incumbrancers and purchasers being here involved, it was necessary to an enforcement of their lien for the material furnished, that appellants should within four months after completion of the contract,

bring suit therefor, or file their verified claim or lien, as provided by section 7 of the mechanic's lien law.

As the claim for a lien by appellants was filed August 9, 1904, unless the above mentioned three items of the claim are to be considered as within the contract of September 1, 1903, appellants are not entitled to enforce their lien. The lien created by the statute attaches at the date of the contract. In this case the contract shown by the evidence to have been entered into September 1, 1903, was partly expressed and partly implied, and related specifically to the furnishing of material to be used in the construction and repair of certain designated buildings and fixtures. When the materials for the construction and repair of the buildings and fixtures specified in the contract were furnished appellants' contract was completed within the meaning of the statute, and they had four months after the date of such completion within which to bring suit or file a verified claim whereby they might enforce their lien.

The buildings and fixtures to be constructed and repaired under the contract for materials therefor, having been fully constructed and repaired by February 1, 1904, appellants must necessarily have furnished all the materials therefor at or prior to that date, and in order to enforce their lien for such materials, they should have brought suit or filed a claim for lien within four months thereafter. This they failed to do, and must be held to have lost their right to enforce a lien for the materials so furnished.

The materials furnished subsequent to the completion of the work specified in the contract, were furnished upon an implied contract, and constituted a running account, each item of which is to be considered a separate claim, a lien for which was enforceable if suit was brought or verified claim for lien filed within four months after it accrued—that is, after each separate item of materials was delivered. This does not mean that a separate suit must be brought, or a separate claim for lien filed to enforce a lien for each item or claim of a running account, but that suit must be brought or claim for lien filed within four months after the first

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of several items of materials constituting a running account have been delivered in completion of the contract therefor.

But conceding that the several items in appellants' claim for materials furnished subsequent to February 1, 1904, and including that of April 8, 1904, which next precedes that of April 12, 1904, could properly be held to have been furnished under the contract of September 1, 1903, the right of appellants to enforce a lien therefor must depend upon whether or not any one of the three items heretofore mentioned was for materials furnished under that contract. The claim for lien having been filed August 9, 1904, more than four months after the item of April 8, 1904, it is clear from the evidence that the items of April 12 and April 27 for 1750 shingles were not furnished under the contract of September 1, 1903, because the shingles were not used in the construction or repair of any building on the real estate in which appellee, Helen Juvinall, had a life estate, but were in fact used in repairing a shed on land belonging to D. M. Juvinall. The item of May 17, 1904, was for 1/2 barrel of lime which was used in plastering a dwelling house occupied by a tenant and located on the real estate against which appellants seek to enforce a lien, but the contract of September 1, 1903, did not contemplate the furnishing of materials for any such purpose.

Appellants having failed to institute suit or file a claim for lien for materials furnished within four months after completion of the contract of September 1, 1903, are barred from enforcing a lien for such materials, and the decree dismissing the bill is affirmed.

Affirmed.

**Martha E. Bowser, et al. v. D. Jane Mosier, Executrix,
et al.**

1. *WILLS—how construed.* In construing a will the court will strive to ascertain the intention of the testator; such intention is to be determined upon a consideration of the entire instrument; each clause and phrase in the will is to be given force and effect,

if possible; repugnant words which contravene the evident intention of the testator as clearly expressed may be rejected or transposed; general provisions must yield to specific provisions; where the clauses of a will are irreconcilable and insuperably repugnant, the latter clause will generally prevail; and as an aid to a determination of the testator's intention, the court may consider the nature and extent of his property.

2. *HEIRSHIP—construed.* The word "heirship" as employed in the will in question in this case, construed to designate degrees of kinship.

3. *LIFE ESTATE—will construed with respect to.* Held, from the provisions of the will in question in this case, that the testator did not intend that his wife should have a life estate in all of his property.

4. *BILL TO CONSTRUE WILL—what question cannot be properly determined in.* Whether or not a mortgage incumbrance should be paid by the executors out of the general funds of the estate, is a question which cannot be determined in a proceeding to construe a will, where such question does not arise in such will as one of construction.

Bill to construe will. Appeal from the Circuit Court of Champaign County; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the May term, 1905. Reversed and remanded. Opinion filed March 20, 1906.

MARY E. MILLER, for appellants; CUNNINGHAM & Boggs, of counsel.

F. M. GREEN & SON and GEORGE W. GERE, for appellees.

MR. JUSTICE BAUME delivered the opinion of the court.

This is a bill filed by appellees, D. Jane Mosier, executrix of the will of Philip C. Mosier, deceased, and certain legatees and devisees thereunder, against appellants, Martha E. Bowser and George L. Pickett, and certain other claimants, to construe said will and grant certain other relief.

The holographic will and codicils thereto, in question, omitting the formal parts, are as follows:

2. "After my lawful debts are paid, I give and bequeath to my dear wife Mrs. D. Jane Mosier all my personal and real estate of whatsoever kind or quality. To have and to

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hold and enjoy the rents and profits of the same during her natural lifetime. Except what hereinafter may be mentioned to be disposed of otherwise.

3. At the death of my dear wife, I give and bequeath to George T. Poage (who I raised) a life lease in and to the north half ($\frac{1}{2}$) of the northeast quarter of Section twenty (20) Township eighteen north of range fourteen west. In Champaign County and State of Illinois. And at his death the same shall go to his children. In whom an absolute title shall vest. Provided they, the said children, have a child or children born to them who live to enjoy the same. Otherwise the title shall revert back to my estate to be enjoyed by my and my dear wife's relation according to their inheritance.

4. To Volentine Jacobus (who I raised), I give and bequeath the south half of the said northeast quarter, section twenty (20) town 18 N. R. 14 W. to be enjoyed by him and children upon the same terms and conditions as that bequeathed to George T. Poage and his children.

5. And in order that the said George T. Poage and Volentine Jacobus may share and share alike as near as possible, I direct that after my dear wife's death, Volentine Jacobus shall have the use or rent of the whole quarter section for the period of one crop season. That he may balance up with the said George T. Poage on improvements.

6. The property belonging to my estate at the death of my dear wife. Exclusive of that bequeathed to George T. Poage and Volentine Jacobus or their children. I direct and order that it or the proceed thereof shall be equally divided between my and my dear wife's relation according to their heirship. The heirship not to descend further than to and include grand nephews and nieces.

7. And I further order and direct that whatever of my estate by law would fall to Mrs. R. L. Poisal (my dear wife's sister) the same shall go to Mrs. Cory Moore, her daughter and in case of her death, then to Miss Minnie Moore, her grand-daughter, some as if originally inherited by her.

8. And now in conclusion, I do hereby revoke and annul all former wills made by me. And I do hereby appoint my dear wife Mrs. D. Jane Mosier administratrix and authorize the court to grant her letters of administration without bond

or surety, so the business of my estate may be settled up with as little delay as consistent to or with the interest of heirs or creditors, and whatever real estate laying outside of Champaign County and State of Illinois belonging to me or my estate at my death, I order and direct to be sold to the best advantage by my dear wife as administratrix and the proceed of said sale or sales after retaining ten (10) per cent. for trouble. Divide equally between my and her relations according to their heirship.

The real estate indicated is described as follows, viz.:

All of fractional sections seven, town 20, south of range 35 east. In Brevard County, State of Florida, 51.90 acres.

Southwest quarter of Sec. 32-101-N. R. 35 west 160 acres in the county of Jackson, State of Minnesota.

Lots 2 & 3 Sec. 10 and Lot 1 Sec. 11-100-36 W. in Dickinson County, State of Iowa 172.17 acres. Lots 2-3-81-83-84-86 & 92. In Cottage addition to the city of Des Moines, in the State of Iowa, and the south sixty acres W. 1/2 S. W. 13-22-13 Coffey County, State of Kansas.

9. And I further order and direct, that any promissory notes falling due after my death and collected by my dear wife as administratrix of my estate. The principal of which shall be equally divided between my and my dear wife's relatives according to their heirship, except so much as she may want to retain for her individual use for traveling expense or otherwise. Said sum retained shall not be to exceed twenty-five per cent. of the sum or sums collected.

First codicil:

Whereas I, Philip C. Mosier, of Homer, State of Illinois, did on the 4th day of March, A. D. 1897, make my last will and testament of that date, do hereby declaim this to be a codicil to the same.

I would first say by way of explanation that Pizarro C. Picket of Kingman, Kansas, Mrs. Martha E. (Hawkins-Rice) Bowser of Los Angeles, California, and George L. Picket of Anaheim, California, are my nearest of kin. And whereas George W. Hawkins, of Danville, State of Illinois, who at one time was the husband of the said Mrs. Martha E. Bowser and a separation took place and the said G. W. Hawkins has always treated me kindly, I therefore order and direct that twenty per cent. of the share of my estate

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that would fall to Pizarro C. Picket and twenty per cent. of Mrs. Martha E. Bowser's share and ten (10) per cent. of George L. Picket's share shall go to the said Hawkins, provided he, the said Hawkins, lives to receive and enjoy it, the same otherwise this bequest shall cease at his death.

I would say by way of explanation of Mrs. Rachel L. Poisal being disinherited in my said will, that I feared that if any part of my estate went into her hands at her death it would or a portion of it go to Byron L. Poisal, her son, and on his death would be inherited by his wife and thereby go in a direction not desired by me. But as the said Byron L. Poisal is now deceased, I still think best to not change my will as the said Byron L. Poisal's wife is still living and in case of the death of the said Mrs. Rachel L. Poisal, might have some claim through legal inheritance upon her estate.

Second codicil:

Whereas I, Philip C. Mosier, of Homer, State of Illinois, did on the 4th day of March A. D. 1897, make my last will and testament of that date, do hereby declare this to be a second codicil to said will.

I first would say I do hereby exclude any and all persons not blood relations to myself or to my dear wife from sharing any portion of my estate after my death or the death of my dear wife, except those mentioned in my said will and first codicil. To wit: George T. Poage, Volentine Jacobus and George W. Hawkins, who are not blood relations.

Secondly, I do hereby disinherit any one who may try to break my said will by themselves or in combination with others try to break my said will.

Third codicil:

Whereas I, Philip C. Mosier, of the town of Homer, State of Illinois, did on the 4th day of March, 1897, make my last will and testament of that date, do hereby declare this to be my third codicil to said will.

I would first say the bequests made in said will to George T. Poage and Volentine Jacobus are hereby revoked and in place of said bequests, I give and bequeath to the said George T. Poage the farm lately purchased of W. J. Johns, of Taney County, Missouri, together with fifty-six acres lately secured of the U. S. Government through the said George T. Poage said lands are described as follows viz:

All of the W. $\frac{1}{2}$ of Lots three and four (3 & 4) northwest quarter Sec. 1 & 2 & 3 in the northeast qr. of Sec. two (2) all in town 24 R. 19 W. in Taney County, Missouri, and all of the S. W. qr. of the S. W. qr. of Sec. 35 in town 25 R. 19 in the county of Christian, and the E. $\frac{1}{2}$ of Lot 4 N. E. qr. Sec. 2, town 24 N. R. 19 W. of 5th P. Meridian contain in all three hundred and forty-two (342) acres more or less—valued at \$2,000 dollars.

And in addition to the above bequest, I give and bequeath to the said George T. Poage four thousand (\$4,000) dollars, less what the said George T. Poage may be indebted to me, either directly or indirectly at my death.

To the said Volentine Jacobus, I give and bequeath lot three (3) and fifteen feet off the north side of lot four (4) James Busey's addition to the town of Urbana, known as the Eggleston property, which I value at three thousand (\$3,000) dollars and lot seven (7) block four (4) G. W. Webber's 1st ad. to the town of Urbana (valued at \$1,000) all in the town or city of Urbana, County of Champaign, and State of Illinois, and known as Sophia Mollendorf property, and in addition to the above bequests, I give and bequeath to the said Volentine Jacobus two thousand \$2,000, dollars, making to each of these parties Poage and Jacobus, six thousand dollars each, less what they may be indebted to me at my death. These bequests to be enjoyed by the said parties after the death of my dear wife and no sooner."

The only questions presented for determination on this appeal are, first, does the widow, D. Jane Mosier, take under the will a life estate in all of the real and personal property of the testator and an absolute estate in 25 per cent. of the principal of the promissory notes falling due after the death of the testator and collected by her, and in 10 per cent. of the proceeds of the sale of real estate lying outside of Champaign County, Illinois, or does she take a life estate, only in the real and personal property of the testator exclusive of the principal of the said promissory notes falling due after his death and said real estate lying outside of Champaign County, Illinois; second, does the principal of the promissory notes falling due after the death of the testator,

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less 25 per cent. to be retained by the widow, and the proceeds of the sale of lands lying outside of Champaign County, Illinois, less 10 per cent. to be retained by the widow, constitute a specific legacy to the relatives of the testator and his wife, which vested in such relatives upon the death of the testator, and is payable to them as soon as realized by the executrix; third, is the mortgage incumbrance on the land in Missouri, devised in fee to George T. Poage, subject to the life estate of the widow, amounting to \$1,054.80, and which the chancellor was justified in finding the testator assumed to pay, a proper charge against his estate, payable out of the general funds of the estate.

The decree of the Circuit Court in construing the will adjudges as follows:

First, that upon the death of D. Jane Mosier, the widow of the testator, distribution is to be made of his estate, excepting that portions of the real estate devised to George T. Poage and Valentine Jacobus, as follows: To George T. Poage, \$4,000 less what he may be indebted to the estate; to Valentine Jacobus, \$2,000, less what he may be indebted to the estate; one-half of the balance to the brothers and sisters of the testator, or their heirs, and the remaining one-half to the brothers and sisters of D. Jane Mosier, or their heirs. No distribution to be made, however, beyond the grand-nephews and nieces of either the testator or D. Jane Mosier, excepting, however, from the interest of P. C. Picket, Martha E. Bowser and George L. Picket, the bequest to George W. Hawkins, provided said Hawkins lives to receive the same. Also excepting the interest of Mrs. R. L. Poisal, a sister of D. Jane Mosier, which interest shall go to Mrs. Cora Moore, or her daughter, Minnie Moore, as provided by the will of the testator.

Second, that the clauses of the will directing the sale of the lands lying outside of Champaign County, Illinois, and relating to the collection of notes due after the death of the testator and the distribution of these funds, should be construed together as a residuary clause of said will.

Third, that the funds derived from the sale of lands lying

outside of Champaign County, Illinois, and the sums collected from the notes falling due after the death of the testator, constitute a general fund to be distributed under the said residuary clause.

Fourth, that the testator's intention was to provide equally for George T. Poage and Volentine Jacobus from his estate, and that the incumbrance on the land in Missouri devised to George T. Poage should be paid by the executrix.

The value of the testator's estate as inventoried by the executrix, and as appraised for taxation under the inheritance tax law, is as follows:

Principal of notes falling due after the death of the testator	\$6,900.00
Principal of other notes.....	371.94
Cash on hand.....	339.49
Real estate in Champaign County, Illinois	24,880.00
Real estate lying outside Champaign County, Illinois	13,374.00
Total	<u>\$45,865.43</u>

The land in Missouri devised to George T. Poage is appraised at \$2,000, and was subject to a mortgage incumbrance of \$1,054.80, which the testator assumed to pay. The real estate in Champaign County devised to Volentine Jacobus is appraised at \$2,650.

It is elementary, that in construing a will the court will strive to ascertain the intention of the testator; that such intention is to be determined upon a consideration of the entire instrument; that each clause and phrase in the will is to be given force and effect, if possible; that repugnant words, which contravene the evident intention of the testator as clearly expressed, may be rejected or transposed; that general provisions must yield to specific provisions; that where the clauses of a will are irreconcilable and insuperably repugnant, the latter clause will generally prevail; that as

an aid to a determination of the testator's intention, the court may consider the nature and extent of his property. *Rountree v. Talbot*, 89 Ill., 246; *Dickison v. Dickison*, 138 Ill., 541; *Greenwood v. Greenwood*, 178 Ill., 387; *Morrison v. Schorr*, 197 Ill., 554; *Olcott v. Tope*, 213 Ill., 124; *Bennett v. Bennett*, 217 Ill., 434.

Considering clauses 8 and 9 by themselves there can be little room for doubt but that the testator intended thereby to bequeath to the relatives of himself and his wife the proceeds of the sale of certain real estate lying outside of Champaign County, Illinois, less 10 per cent. to be retained by his wife, and the principal of promissory notes falling due after his death which should be collected by his wife, less 25 per cent. to be retained by her, free from any life estate therein of his wife.

These legacies are, in themselves, specific and definite. The real estate to be sold is particularly described and the principal of the notes to be collected is definitely determined. We are unable to understand upon what theory clauses 8 and 9 can be treated as residuary clauses of the will. They do not purport in terms to dispose of the residue of the estate—that is, estate not otherwise disposed of—but dispose of property specifically ascertained and identified.

It is urged by counsel for appellees that the intention of the testator to give his wife a life estate in the property mentioned in clauses 8 and 9 and to postpone its distribution until her death, is manifest because a division of it by the widow, among the relatives of herself and the testator according to their heirship, is impossible in her lifetime, her heirs not being ascertainable until her death. If the bequests were to the heirs of the testator and his wife, there would be force in the argument, but the bequests are to the relatives of the testator and his wife—that is, to persons connected by kinship or consanguinity to the testator and his wife—such persons, relatives, were a class ascertainable during the life of Mrs. Mosier.

The word "heirship," employed by the testator in clauses 8 and 9, we think was intended by him to designate degree

of kinship, so that transposing the phrase used, it would read "according to their degree of kinship."

That the testator did not intend his wife should have a life estate in all of his property, seems clear by reference to the second clause of the will, wherein he says: "After my lawful debts are paid, I give and bequeath to my dear wife, Mrs. D. Jane Mosier, all my personal and real estate of whatsoever kind or quality. To have and to hold and enjoy the rents and profits of the same during her natural life, *except what hereinafter may be mentioned to be disposed of otherwise.*" If the testator's wife has a life estate in all of his property, and the specific bequests in clauses 8 and 9 are not operative to vest in the legatees an estate in 90 per cent. of the proceeds of sale of lands and 75 per cent. of the principal of notes collected, unincumbered by such life estate, the language in clause 2, quoted in italics, must be held to be meaningless. That language clearly expresses an intention on the part of the testator to dispose of a portion of his estate otherwise than subject to a life estate in his wife, and it can only relate to the disposition made by clauses 8 and 9, because all other bequests in the will and codicil are made expressly and unmistakably subject to her life estate therein. Furthermore, in the second codicil to his will, the testator uses language as follows: "I first would say I do hereby exclude any and all persons not blood relations to myself or to my dear wife from sharing any portion of my estate after my death or the death of my dear wife, except those mentioned in my last will and first codicil, to-wit: George T. Poage, Volentine Jacobus and George W. Hawkins, who are not blood relations." If no part of the testator's estate was to be distributed during the life of his wife, why should he, in this general reference to bequests theretofore made by him, by the use of the words "my death or," in effect anticipate a distribution after his death and before the death of his wife. If clauses 8 and 9 be construed as giving to the relatives of the testator and his wife certain legacies free from the wife's life estate, and clause 6 be construed as a residuary clause, giving to the

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same relatives the property remaining at the death of his wife, except that bequeathed to George T. Poage and Volentine Jacobus, the use by the testator of the words "my death or" quoted above may be given some significance. Excluding such construction, the words "my death or" are without meaning and tend merely to confuse. If no distribution to relatives was intended before the death of his wife, the testator would have omitted the words "my death or" and only used the words "after the death of my dear wife."

The testator employs no expression in clauses 8 and 9 showing an intention to postpone the vesting of the legacies in the relatives of himself and his wife until the latter's death, and that he purposely avoided employing any such expression in those clauses, seems probable in view of the fact that in the third codicil to his will, wherein he devises and bequeaths certain property to George T. Poage and Volentine Jacobus, he, by apt terms, postpones their enjoyment of such devises and bequests until after the death of his wife.

It is also worthy of notice that the testator, in the eighth clause of his will, appoints his wife executrix, and waives the giving of security by her as such, to the end that his estate may be settled with as little delay as is consistent with the interest of his heirs and creditors. If the testator gave his wife a life estate in all of his property, his heirs could have no interest in any portion of it until her death, and a speedy settlement of his estate could not in any way accelerate the vesting of the interest of such heirs.

It is urged on behalf of appellees that the sixth clause of the will manifests a clear intention on the part of the testator to give to his wife a life estate in all of his property, and that a proper construction of that clause is conclusive of her rights, in that regard under the will. The sixth clause should, we think, be held to be the residuary clause of the will. By no other clause of his will does the testator dispose of his estate not specifically devised and bequeathed to certain individuals, and but for that clause the larger part of his estate, viz.: all of his real estate in Champaign County, Illinois, except that devised to Volentine Jacobus, and all of

his personal property except promissory notes falling due after his death, would be intestate.

True, the language of that clause, considered by itself, may be construed as expressive of an intention that a division of all of his property, except that bequeathed to George T. Poage and Volentine Jacobus, between his and his wife's relatives, should not be made until the death of his wife, but construing the clause as it should be, in connection with the other clauses of the will, it may well be held to relate only to the disposition of his property not otherwise disposed of. If clauses 8 and 9 be construed as giving to certain legatees specific legacies unincumbered by a life estate in testator's wife, the property thereby bequeathed would have been distributed to such legatees in the lifetime of his wife, and at her death, such property would not belong to his estate. From that point of view, the language of the sixth clause, viz.: "The property belonging to my estate at the death of my dear wife," can only refer to property in which the testator's wife had a life estate, and which was not to be distributed until her death. When so interpreted and construed, the sixth clause is not inconsistent with, or repugnant to, any other provision in the will.

It is insisted by counsel for appellees that the construction of the will contended for by appellants will operate to impoverish the widow of the testator, and give a large portion of the estate to distant relatives; that the will shows upon its face that the testator had great affection for his wife, and it is unreasonable to suppose that he intentionally preferred such relatives, and gave his wife less of his estate than she would have been entitled to under the law, if he had died intestate.

The intention of a testator with reference to the disposition of his estate is to be determined, if possible, by an interpretation of the language employed by him in giving expression to such intention, and when the testator's intention can be so determined, it must prevail. It is only in case of doubt of such intention, arising from inability clearly to interpret the language so employed, that the considera-

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tions suggested by counsel for appellees may be availed of to aid in arriving at the true intention of the testator. By the terms of the will in question, as we construe it, appellee, D. Jane Mosier, is given absolutely 25 per cent., or \$1,725, of the principal of notes falling due after the death of the testator, and 10 per cent., or approximately \$1,500, of the proceeds of sale of the lands lying outside of Champaign County, Illinois, and in addition is given a life estate in real estate in Champaign County, valued at \$24,880, and in real estate in Missouri valued at \$2,000, and in all personal property except the principal of notes falling due after the testator's death. That she would have been entitled to a much larger share of the estate of her husband, if she had exercised her option to renounce under the will, does not affect the question involved. If the will should be construed as giving her what she here claims—a life estate in all of the property of her husband—it would still fall far short of what she would have received had she renounced under the will. The presumption is that she, as well as the testator, knew the law, and they must be held to have acted with that knowledge.

The question, whether or not the mortgage incumbrance on the land in Missouri, devised to George T. Poage, is a proper claim against the testator's estate, and should be paid by the executrix out of the general funds of the estate, does not properly arise for determination in this proceeding in equity to construe the will, but is determinable in the County Court where the administration of the estate is now pending.

The chancellor having found that the testator assumed to pay the incumbrance as a part of the purchase price for the land, such incumbrance became the personal debt of the testator and its payment, not having been made a charge on the land by the terms of the will, it was provable against the testator's estate, and the executrix was bound to pay the same.

The decree is reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

L. B. Graham v. James Ford.

1. **LEASE**—*when power to execute, wanting.* A party having an interest in land has no right to make a lease thereof which may interfere with the decree of the court in a partition proceeding *pendente lite* at the time of the execution of such lease.

2. **TENANT IN COMMON**—*when cannot maintain action against co-tenant.* A tenant in common cannot bring suit against another tenant in common to recover an undivided interest in premises unless he has been ousted or evicted by said other tenant in common.

Forcible detainer proceeding. Appeal from the Circuit Court of Fulton County; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the November term, 1905. Affirmed. Opinion filed March 20, 1906.

LUCIEN GRAY, for appellant.

CHIPERFIELD & CHIPERFIELD and C. B. ADAMS, for appellee.

MR. JUSTICE RAMSAY delivered the opinion of the court.

This was an action of forcible detainer brought before a justice of the peace by appellant, L. B. Graham, against James Ford, appellee, to recover the possession of the undivided two-thirds of the premises involved. A trial was had before that court, from whose decision an appeal was taken to the Circuit Court of Fulton county, where the cause was tried *de novo* and a judgment rendered in favor of appellee, Ford. Graham appeals.

Appellee, Ford, was a tenant upon the premises involved for the year ending March 1, 1905, having the full and exclusive possession under a lease made to him by Averilla Henkle, R. F. Henkle and R. F. Henkle, trustee for Grace Henkle, who owned said premises in an undivided one-third part each. Pending the running of the lease, and on May 3, 1904, Averilla Henkle brought suit in the Circuit Court

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of Fulton county for a partition of said premises and had summons served therein.

On the tenth day of August, 1904, R. F. Henkle; for himself and as trustee and assuming to act for Averilla Henkle, executed a lease to appellant, L. B. Graham, for the premises involved to run from March 1, 1905, to March 1, 1906. It turned out that said R. F. Henkle had no sufficient authority to make such lease for Averilla Henkle, and presumably on that account appellant brought suit against Ford in forcible detainer for the undivided two-thirds of the premises, on the 24th of March, 1905.

In his demand, prior to the beginning of suit, appellant asked for the possession of the two-thirds interest only under the lease, alleged to have been made to him by R. F. Henkle and R. F. Henkle, as trustee or conservator.

This record presents only two questions which we think are of sufficient merit to warrant discussion. First, it appears from the evidence as abstracted that a suit in partition was commenced in Fulton County Circuit Court to partition all the lands involved, on the 3rd day of May, 1904, over three months prior to the time when R. F. Henkle attempted to lease these lands to Graham. Henkle says he was served with summons in that case; so that at the time of the execution of the lease by him to Graham there was then a suit pending in the Circuit Court for the full determination of his rights in the premises as well as the rights of all others interested. Therefore he had no power or authority to make any lease that might carry his interest or the interest of others forward to such a time as would interfere with the Circuit Court's power to direct a sale and fix the terms thereof. Upon the filing of such bill for partition the leasing, if any, should have been made by the authority and under the direction of the court in which the suit for partition was pending.

Upon the second question we hold that one tenant in common cannot bring suit against another tenant in common to recover an undivided interest in premises, unless he has been ousted or evicted by such other tenant in common. In Lick

v. O'Donnell, 3 Cal., 59 (58 Amer. Dec., 383), which was a suit to recover original possession, it was said that as the parties held as tenants in common, the action of forcible entry and detainer could not be maintained.

The case of *Mason v. Finch*, 1 Scam., 496, cited by appellant, does not disturb the holding announced above. In that case Finch and Mason were joint tenants of the dwelling house and Mason forcibly entered the whole of the dwelling house and turned Finch out of his moiety of the house, and in that case, while it was held that the suit was properly brought, yet there had been a previous possession and an actual ouster which warranted a recovery in such suit.

We think the judgment of the court below was right. The judgment is affirmed.

Affirmed.

**Chicago, Burlington & Quincy Railway Company v.
Emma Hendricks.**

1. *CONTRACT—what constitutes, as between member and fraternal benefit society.* The regulations of such society, together with the application for membership and the certificate of membership, constitute the contract and must be read and construed together.

2. *FRATERNAL BENEFIT SOCIETY—when regulations of, invalid.* A regulation of such an organization which precludes the personal representative of a deceased member from benefits unless releases of claim for damages against a railroad company are obtained from parties other than such personal representative, who receive no consideration therefor, is unreasonable and invalid.

3. *FRATERNAL BENEFIT SOCIETY—when amendments of regulations invalid.* Notwithstanding the power to amend the regulations is retained, amendments which are oppressive, vexatious, contrary to public policy or which manifestly are calculated to defeat or destroy the fundamental plan of benefits, are invalid.

4. *FRATERNAL BENEFIT SOCIETY—when regulation providing for submission of disputes for decision, invalid.* A regulation of a fraternal benefit society by which the beneficiary is compelled to submit the question of liability to such society for decision, is invalid, especially where the tribunal which would decide the dispute is composed of individuals having collateral and adverse interests.

C., B. & Q. Ry. Co. v. Hendricks.

Action in assumpsit. Appeal from the Circuit Court of Adams County; the Hon. ALBERT AKERS, Judge, presiding. Heard in this court at the May term, 1905. Affirmed. Opinion filed March 20, 1906.

JOSEPH N. CARTER and MATTHEW F. CARROTT, for appellant; CHESTER M. DAWES, of counsel.

CARL E. EPLER, for appellee.

MR. PRESIDING JUSTICE PUTERBAUGH delivered the opinion of the court.

This is an action in assumpsit by appellee against appellant predicated upon a contract and certificate of membership issued by the Relief Department of the Chicago, Burlington & Quincy Railroad Company to Peter A. Hendricks and payable to appellee, his widow, as beneficiary. The Circuit Court overruled demurrers to certain of plaintiff's replications. The defendant elected to abide by its said replications and refused to plead further, whereupon the court assessed the plaintiff's damages at \$777, and rendered judgment therefor upon the pleadings. To reverse such judgment this appeal is prayed.

The declaration, in brief, avers that Peter A. Hendricks, the plaintiff's husband, on May 17, 1890, was an employe of the C., B. & Q. Railroad Co. at Quincy, Illinois, and made his application for membership in its Relief Department, therein agreeing that \$2.25 be retained from his wages per month to secure him the relief benefits granted by the regulations of said department, and providing that the death benefits should be payable to his wife, Emma Hendricks, the plaintiff, which application was approved, and he received from said department the benefit certificate in words and figures following, to-wit:

"BURLINGTON VOLUNTARY RELIEF DEPARTMENT.

Certificate of membership in the Relief Fund.
Original membership began May 17th, 1890. No. 7120.

OFFICE OF THE SUPERINTENDENT,
CHICAGO, ILL., December 1, 1890.

This certifies that Peter A. Hendricks, employed by the Chicago, Burlington & Quincy Railroad Company, is a member of the Relief Fund of that Company, and is entitled to the benefits provided by the regulations of the Relief Department for a member of the third class, with no additional death benefit of the first class. R. D. 12.

C. H. WILLIAMS,
Assistant Superintendent of the Relief Department."

That the said Hendricks then and there and thereby became a member of said Relief Fund of said railroad company, and the said application and certificate thereby became and constituted a contract by and between said Hendricks and the said railroad company, according to its terms and said regulations of said Relief Department.

The declaration further avers that the death benefits so fixed to be paid on the death of such member were \$750, that Peter A. Hendricks continued in the employ of the C., B. & Q. R. R. Co. until its railroad was taken over by the C., B. & Q. Ry. Co. in November, 1901, when he entered and remained in the employ of said railway company as a switchman in its yards at Quincy until his death; that said railway company took over and assumed, among others, the obligation of said relief contract, and retained \$2.25 from his wages monthly, the whole amount so retained at his death being about \$400; and that said Hendricks, while a member of said Relief Fund in good standing, was killed, on July 23, 1903, while uncoupling cars for defendant in its train yards at Quincy.

To the declaration four special pleas were interposed, a determination of the sufficiency of which will be decisive of the legal questions involved in this appeal. Pleas one

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and two aver that there were persons other than plaintiff, to-wit: Harold B. Hendricks and Clyde L. Hendricks, who might legally assert claims against said railway company arising from the death of said insured, and that plaintiff did not deliver, as a condition precedent to her being paid the benefits claimed, releases from such other persons, in conformity with certain regulations of the Relief Department, adopted November 20, 1901, which are set out in said pleas and are substantially as follows:

1. "The Relief Department is a department of the company's service in the executive charge of a superintendent, whose directions in carrying out its regulations are to be complied with, subject to the control of the president, except in such matters as are under the control of the Advisory Committee," * * *

2. "The object of the department is the establishment and management of a fund, to be known as the 'Relief Fund,' for the payment of definite amounts to employees contributing thereto, who are to be known as 'members of the Relief Fund,' when under the regulations they are entitled to such payment by reason of accident or sickness, or, in the event of their death, to the relatives or other beneficiaries designated by them with the approval of the Superintendent."

3. "The Relief Fund will consist of voluntary contributions from members thereof, income derived from investments and from interest paid by the company, and appropriations by the company when necessary to make up deficiencies."

4. "The Company shall have general charge of the Department, guarantee the fulfillment of its obligations, take charge of all moneys belonging to the Relief Fund and be responsible for their safe keeping, pay into the fund interest at the rate of four per cent. per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the department and pay all the operating expenses thereof."

5. "There shall be an Advisory Committee constituted as follows: The General Manager of the Chicago, Burlington & Quincy Railroad shall be ex-officio a member and chair-

man of the committee. The other members of the committee shall be chosen annually, * * * as follows: One-half shall be chosen by the Board of Directors, and one-half by the employees, members of the Relief Fund, from among themselves." * * *

9. "The Superintendent shall have charge of all business pertaining to the department. He shall * * * sign all orders for the payment of benefits, furnish to the Committee such reports as they may require, decide all questions properly referred to him, and exercise such other authority as may be conferred upon him by the President or the Committee."

13. "The moneys received for the Relief Fund shall be held by the Company in trust for the department. The Committee shall direct the investment and any changes therein of money which is not required for immediate use. The Company being the trustee and guarantor of the Relief Fund, the investments shall be in such securities as shall have been approved by the Board of Directors, and shall be in the name of the Company, in trust for the Relief Department."

14. "If during any period of three years, * * * the amount contributed by the members of the Relief Fund and received from other sources, including any unexpended balance not otherwise appropriated, shall not be sufficient to pay the benefits as they become due, the Company shall advance the amount necessary for this purpose reimbursing itself, if the income within the period will allow, and if at the end of any such period there shall still be a deficiency, as shown by the Treasurer's books, the Company, having advanced the money necessary to pay the deficiency, as above provided, shall assume the same and cancel the liability of the Relief Fund. But if at the end of any such period there shall be a surplus after making due allowance for liabilities incurred and not paid such surplus shall not be used to make up any deficiency in any previous period, but shall be used for the sole benefit of members of the Relief Fund in payment of benefits as provided in the regulations unless otherwise determined by a vote of two-thirds of the committee and approved by the board of directors. Death benefit, together with any unpaid disability benefits, shall be payable to the beneficiary of a deceased member upon proof of claim

and execution and delivery of the necessary releases in conformity with Regulation 64."

64. "In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any company associated therewith in the administration of their relief departments. The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of all claims against the Relief Department, as well as against the company and all other companies associated therewith as aforesaid, arising from, or growing out of, the death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the company or any other company associated therewith as aforesaid for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the Relief Department and of the company created by the membership of such member in the Relief Fund shall thereupon be forfeited without any declaration or other act by the Relief Department of the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed. The payment by the company, or any company associated therewith as aforesaid, of any amount in compromise of a claim for damages arising from or growing out of an injury to, or the death of, a member shall preclude any and all claims for benefits from the Relief Fund arising from or growing out of such injury or death."

The second and fifth pleas also set out the application of the deceased for membership, which contains the following provisions:

"I, Peter A. Hendricks, of Quincy, in the County of Adams, State of Illinois, now employed by the Chicago, Burlington & Quincy Railroad Company, as switchman, on the C., B. & Q. R. R., do hereby apply for membership in the Relief Fund of said company, and consent and agree to be bound by the regulations of the Relief Department of said company, which regulations I have read or have had read to me, and by any other regulations of said department hereafter adopted and in force during my membership, and by any agreement now, or hereafter made by said company with any other corporation or corporations now or hereafter associated with it in the administration of their Relief Department."

Following which is an agreement that the company shall apply as a voluntary contribution from the wages of applicant the sums mentioned in the declaration to secure the benefits provided for; and that in case of death, the death benefit shall be payable to his wife, Emma Hendricks, "or to such other person or persons as I shall subsequently designate in writing, in substitution therefor." And also the following clause:

"I also agree, that, in consideration of the amounts paid and to be paid by said company for the maintenance of the Relief Department, the acceptance of benefits from the said Relief Fund for injury or death shall operate as a release and satisfaction of all claims for damages against said company, arising from such injury or death, which could be made by me or my legal representatives."

First. By her replications to said pleas, appellee avers that on February 10, 1904, she exercised the option conferred upon her by the relief contract, and offered and still offers to the superintendent of the Relief Department, to execute and deliver her individual release of the Relief Department and the defendant for said benefits, as well as an additional release by her as administratrix for all damages that might be claimed by her individually by reason of the death of her husband; that said superintendent refused to

accept the said releases so offered as sufficient, but further required that she also execute a release as such administratrix in full satisfaction and discharge of all claims or causes of action which she, as such administratrix, had or might have against the defendant on account of the death of her intestate; that she refused to execute said last mentioned release upon the ground that the regulations requiring the same were unreasonable, and that she, as such administratrix, had no right or power and could not be required to release any right of action of said children and next of kin.

A contract similar to that here involved was under consideration in *Eickman v. C., B. & Q. R. R. Co.*, 169 Ill., 312. It was there contended that such contract was against public policy and void for the reason that defendant could not by a contract in advance exempt itself from liability to its employees for its gross negligence. In reply to such contention the court said:

"The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have had until after knowledge of all the facts and an opportunity to make his choice between the sure benefits of the association or the chances of litigation." It was held that the plaintiff having accepted the benefits of the association could not be justly entitled to assert as well his right of action for damages.

In *Maney v. C., B. & Q. R. R. Co.*, 49 Ill. App., 105, an employee was a member of appellant's Relief Department and under his contract his widow was, as here, named as beneficiary. Upon his death, through accident, the widow accepted the benefits, and then as administratrix brought suit for damages in behalf of his children as next of kin. This court there held that the father's contract did not affect the rights of his children, but those of the widow only, and that the widow was not barred from prosecuting her action as administratrix. The contract there under consideration was similar to that here involved except that it embodied no regulation providing that releases should be delivered of all

claims growing out of the death of the member executed by all who might legally assert such claims, such regulation, as it exists at present, having been subsequent to the termination of the Maney suit. Many cases have been cited by counsel for appellant wherein relief contracts have been held valid by courts of last resort. C., B. & Q. R. R. Co. v. Olson, (Neb.), 97 N. W. 831; Id. v. Curtis, 51 Neb. 442; Maine v. C., B. & Q. R. R. Co., 109 Iowa, 260; Clinton v. C., B. & Q. R. R. Co., 60 Neb., 692; Oyster v. Burl. Relief Dept. (Neb.), 91 N. W., 699; P. R. Co. v. Cox, 55 Ohio St., 497. The question usually arose where a second remedy was sought, the courts in each instance holding that acceptance of relief benefits barred the member or beneficiary accepting the same from suing for damages for same injury, or being paid a judgment for damages for same, barred the party so accepting from suing for such benefits. All of such cases seem to turn substantially on the principle of the election of remedies, of which right it is manifest appellee would be deprived by the construction sought by appellant to be placed upon the term of regulation 64, above quoted.

The regulations of the association together with the application of the deceased for membership, and the certificate of membership, constituted the contract between the deceased and the association, and must be read and construed together. Life Ass'n v. Kentner, 188 Ill. 431. The effect of regulation 64 was to require appellee, as a condition precedent to her being paid the benefit claimed, to procure and deliver to the association, in addition to her individual release, releases from others, who were strangers to the contract, and to whom no consideration moved for such releases. While it is true that appellee as administratrix, if acting in good faith, had power to release or settle the right of action conferred upon her by statute for her benefit and that of the next of kin, without the consent of such next of kin, and this without the permission of the probate court, and that such settlement would be conclusive and binding as between administrator and appellant, it is also true that if she did so settle or release such cause of action, wrongfully, she could

and possibly would be called to account by the next of kin. *Henchey v. Chicago*, 41 Ill., 136; *Washington v. R. Co.*, 136 Ill., 491; *Perry v. Carmichael*, 95 Ill., 519; *Mattoon Gas Co. v. Dolan*, 105 Ill. App., 1. That a release by her of her right of action as administratrix against appellant, without the consent of the next of kin, upon no other consideration than the payment to her of the benefit claimed, would be in bad faith and deprive them of their legal rights without compensation, is too clear to require discussion. The regulation in question imposed upon the beneficiary a condition precedent impossible of performance for obvious reasons and was clearly destructive of the right of the beneficiary to elect whether she would accept the benefit from the association or prosecute her right of action against appellant. We are further of opinion that said regulation is unreasonable and void for the following additional reasons: By the terms of his original application the deceased agreed that the acceptance of benefits should operate as a release and satisfaction of all claims for damages which could be made by him or his legal representatives. This clause has been construed by the Supreme Court of Nebraska in the case of *C., B. & Q. R. R. Co. v. Wymore*, 40 Neb., 645, where it was held that the widow had thereunder an option to accept the death benefit; that her acceptance released her cause of action against the company but that neither the membership of the insured nor his contract nor the acceptance of the widow released her cause of action as administratrix as to the children. To the same effect are *C., B. & Q. R. R. Co. v. Bell*, 44 Neb., 44, and other cases cited by appellee. If the rule thus laid down be the law, and we are inclined to hold that it is, appellee's right of recovery can only be defeated by reason of the restrictive clauses in the regulation under consideration, which it will be seen was adopted after the making of the original contract as represented by the application and certificate of membership. We regard it as well settled that although the contract of membership provides that such contract is subject to by-laws or amendments, which may thereafter be adopted, such by-laws or amend-

ments, must, when adopted, be reasonable, not oppressive or vexatious, nor contrary to public policy. They must be such as are authorized by the nature and character of the association not manifestly detrimental to its interests. Any additional by-law or amendment which entirely changes the scheme of insurance and makes a radical departure from the fundamental plan, is not a reasonable exercise of the reserve power of amendment. If such by-law is calculated to defeat or destroy the fundamental plan, or substitute for it some other and essentially different scheme, its adoption and enforcement would be an abuse of the power conferred, a violation of the contract, and therefore unreasonable and invalid.

If this regulation is susceptible of the construction contended for by appellant, its adoption was clearly a radical departure from the fundamental plan evidently contemplated by the regulations of the association. The object is therein stated to be "the establishment and management of a fund * * * for the payment of definite amounts to employees when under the regulations they are entitled to such payment by reason of accident or sickness, or, in the event of their death, to the relatives or other beneficiaries designated by them * * *." In view of the undertaking by appellant to guaranty the obligation of the association, handle and invest its funds, supply the facilities for conducting its business, pay all expenses thereof, and to cancel any liability of the association to it for any deficiency, the provision that a member or beneficiary shall be required to elect whether he or she will elect to accept the benefit, or to prosecute a right of action in the event of injury or death, if occasioned by the alleged negligence of appellant, has been properly held to be not unreasonable, nor contrary to the fundamental purposes of the association. The effect of the regulation is, we think, to enable appellant to relieve itself of liability to its employees, who may be members of the association, for damages resulting from its actual or alleged negligence in the operation of its railroad, more readily and at less expense than it could otherwise. By it, in case of death of the member, the services of the beneficiary are actively enlisted to pro-

C., B. & Q. Ry. Co. v. Hendricks.

cure the release of claims of others, many of which are just and which might otherwise be recovered by suit or compromise. The association would thus be diverted from its manifest original objects and purposes and converted to a large degree from a relief department into a branch of the claim department of the appellant railroad company. The benefits to be derived by appellant from such an association would be so great as to render the word "relief" in this connection a misnomer. The contract as originally entered into by the insured provided for the payment of the benefit to appellee and her only. Nothing would or could become due under it to the next of kin, upon whom, as well as appellee, the statute confers a right of action. The regulation in question, if construed as contended by appellant, imposes upon a widow with children, as in this case, a burden which was manifestly not contemplated by the original contract, and frequently impossible of performance, that of procuring releases from persons to whom nothing is due under such contract. Its effect is to defeat largely the purposes and objects of the original contract and of the association itself.

Appellant relies chiefly upon the cases of *Fuller v. B. & O. Relief Ass'n*, 67 Md., 433; *Owens v. B. & O. R. Co.*, 35 Fed. 715; *State v. B. & O. R. Co.*, 36 Fed., 655; *Donald v. C. B. & Q. R. Co.*, 33 Iowa, 284; *Johnson v. R. Co.*, 163 Pa. St., 127, as sustaining the validity of its construction of the regulations. Lack of time and space prohibits an analysis or discussion of such cases. It will suffice to say that if the views there announced can be said to be in conflict with those herein expressed we are not prepared to follow them. We are therefore of opinion that, if susceptible of the construction sought to be placed upon it by appellant, regulation 64 is unreasonable and void in so far as it deprives appellee of the right to an election as stated.

Second. Pleas 3 and 4 set out the following agreement contained in the application made by the deceased for membership, viz.:

"I also agree for myself and those claiming through me, to be especially bound, by regulation numbered 64, provid-

ing for final and conclusive settlements of all disputes by reference to the superintendent of the Relief Department and on appeal from his decision to the Advisory Committee."

and then aver that plaintiff failed to submit her claim or the question regarding the liability of the defendant to pay the same, to the superintendent of the Relief Department, nor take any appeal of the same to the Advisory Committee as provided by regulation 66 which is as follows, viz.:

66. "All questions or controversies of whatsoever character arising in any manner, or between any parties or persons in connection with the Relief Department or the operation thereof, whether as to any claim for benefits preferred by any member or his legal representative or his beneficiary, or any other person, or whether as to the construction of language or meaning of the Regulations, or as to any writing, decision, instruction or acts in connection with the operation of the Department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless an appeal from such decision shall be taken to the committee within thirty days after notice of such decision to the parties interested. When an appeal is taken to the committee it shall be heard by said committee without further notice at their next stated meeting, or at any such future meeting or time they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties without exception or appeal."

The replications to said pleas allege that plaintiff was not bound to comply with the requirements of said regulations for the reason that requirements of said regulation 66 are unreasonable, against public policy, unlawful and void.

Appellant contends that in associations of this character the member may make a valid agreement to exhaust his remedy within the association itself before appealing to the courts, and cites a number of authorities to support such proposition. On the other hand appellee insists that regula-

tion 66 can be applied, if at all, to matters concerning the discipline, regulation and disposition of the Relief Fund only, and does not apply whether the question is as to whether benefits are due to a beneficiary. We are of opinion that the latter contention is well-founded. As is said in *People v. Order of Foresters*, 162 Ill., 78: "There is a clear distinction between the obligation to appeal from lower to higher tribunals of the society itself resting upon one who presents a question of discipline, and such obligation so far as it concerns one who asserts a claim to money due upon a contract. Where the controversy is concerning the discipline or policy or doctrine of the order or fraternity, the member must resort to the method of procedure prescribed by the association including the remedy by appeal, before invoking the power of the courts. But it is otherwise, where a member claims money due from the society on its contract of insurance; in such case, the right to resort to the courts to coerce payment will not be abridged by the right of appeal from a lower to a higher tribunal of the society as conferred by its laws and rules. 'Courts of justice are freely open to those who seek money due them upon a contract.'"

While it is true that parties may make valid and binding agreements to submit questions in dispute to the arbitrament of persons or tribunals other than regularly organized courts, and where members of an association are bound where the by-laws so provide, to first submit matters in dispute between themselves, whether relating to membership or property rights, to a tribunal provided by the by-laws, before resorting to the courts (*Pacaud v. White*, 218 Ill., 138), we cannot recognize the doctrine that where, as in this case, the dispute is whether a beneficiary is entitled to recover money from the association, that is between a member and the association itself, such beneficiary can be compelled to submit the questions in dispute to the arbitrament of the association, especially where, as in the present case, the tribunal is mainly composed of the officers of the railroad company. Appellant would thus be made the judge in its own

cause. *Grand Lodge v. Orrell*, 97 App., 246. We regard the regulation, if the construction contended for be the proper one, as so unreasonable as to render the same incapable of being enforced for the purposes here sought. If, however, such regulation can be said to require appellee before bringing suit to pursue the remedy thereby provided, the requirement is one which appellant may and has waived by refusing absolutely to pay the claim. *Supreme Lodge v. Zerulla*, 99 App., 630, and cases there cited.

We are of the opinion that appellee could not be barred of her right of action by reason of anything contained in appellant's pleas.

The judgment of the Circuit Court is affirmed.

Affirmed.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURT OF ILLINOIS
DURING THE YEAR 1906

City of Chicago v. W. A. Paulsen, for the use of W. C. Niblack.

Gen. No. 12,802.

1. SPECIAL ASSESSMENT REBATES—*action lies to recover.* An action lies to recover of a municipality special assessment rebates unlawfully withheld. Citing *City of Chicago v. Singer*, 116 Ill. App. 559; *City of Chicago v. Fisk*, 123 Ill. App. 404.

2. SPECIAL ASSESSMENT REBATES—*what remedy need not be resorted to, to recover.* A taxpayer entitled to the return of rebates upon special assessments paid by him is not bound to seek his remedy against the officers of the municipality who have diverted the funds from which primarily he should have been reimbursed.

Action of assumpsit. Appeal from the County Court of Cook County; the Hon. DWIGHT C. HAVEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906.

ROBERT REDFIELD and FRANK JOHNSTON, JR., for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

No appearance for appellee.

MR. PRESIDING JUSTICE SMITH delivered the opinion of the court.

Appellee brought an action in assumpsit against appellant before a justice of the peace to recover the amount of \$100.36

claimed as rebate due him on a special assessment levied for curbing, grading and paving Oak place in the city of Chicago. On appeal to the County Court the cause was submitted to the court for trial without a jury and the court entered judgment for \$100.36.

It was stipulated on the trial that on or about May 21, 1895, William A. Paulsen, who was then the owner of lots 50 and 51 in the resubdivision of block 2 of Hamilton, Weston & Davis subdivision of the south half of the southwest quarter of section 20, township 40 north, range 14 east of the third principal meridian in Cook County, Illinois, paid \$213 to the city of Chicago for the special assessment levied by said city for said improvement, and that after said amount had been paid it was found that there was due to said Paulsen \$100.36 for excess of his proportionate share of the cost of the improvement.

On December 18, 1902, in consideration of \$1 and other good and valuable consideration, Paulsen sold and assigned his right, title and interest in said \$100.36 to W. C. Niblack. Frequent demands and requests for payment of said sum have been made upon the city, but it has never been paid, or any part thereof. It further appears that there was an improper administration of the fund by the city officials whereby a shortage or deficit of \$32.77 exists.

It is urged on behalf of appellant that rebates on special assessments are payable only out of the special fund for an improvement and cannot be recovered out of the general fund of the city in this action.

It is also contended on behalf of appellant that where there has been an improper administration of the fund by the city officials, by reason of which a shortage in the fund was created, the remedy must be against the officers and not against the corporation.

We have heretofore considered the first of the above contentions in *City of Chicago v. Singer*, 116 Ill. App., 559, and in *City of Chicago v. Fisk*, 123 Ill. App., 404, and no reason appears for changing our conclusions adverse to the contention there expressed.

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The appellant is responsible for the fund to the taxpayer. Appellee is not bound to seek his remedy against the officials. R. S. 1895, sec. 65 of art. 9, Cities and Villages Act; Wells v. City of Chicago, 66 Ill., 280.

The judgment is affirmed.

Affirmed.

Cooke Brewing Company v. Stephen Ryan.

Gen. No. 12,271.

1. NEGLIGENCE—*question as to whether rate of speed constitutes, is for the jury.* The question as to whether the driving of a wagon at a particular rate of speed is or is not negligence, is one to be determined by the jury from the evidence.

2. INTOXICATION—*whether, contributed to injury, for the jury.* Whether the driver of a wagon was intoxicated and whether such intoxication contributed to the injury complained of, are both questions of fact to be determined by the jury from the evidence.

Action on the case for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906.

E. E. GRAY, F. J. CANTY and J. C. M. CLOW, for appellant.

JAMES C. McSHANE, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment recovered by appellee against it for \$10,000 for personal injuries alleged to have been sustained by him through the negligence of appellant.

The injury was caused by an empty beer keg or half barrel which fell from a wagon of the defendant and struck the plaintiff and inflicted the injuries complained of.

The negligence alleged in the declaration was that: "The defendant, through its said servant, negligently caused and permitted said wagon to be loaded with said beer kegs in

such a negligent and improper manner, and so recklessly, negligently and carelessly drove and managed said horses and wagon, that as a result and in consequence thereof one of said beer kegs was thereby then and there thrown and fell from said wagon to and upon the plaintiff," etc.

The principal contention of appellant is that the verdict was against the evidence.

Emerald avenue, a north and south street, is about 250 feet east of Halsted street. Twenty-sixth street runs east from Halsted street across Emerald avenue. There were in 26th street two street car tracks, the north, the west-bound, and the south the east-bound track, and a switch track ran southeasterly from the north track into the south track about midway between Halsted street and Emerald avenue. Upon the wagon of defendant were from fourteen to eighteen empty beer kegs. On each side of the wagon, swinging between the wheels, suspended by what are called "tongs," was an empty beer barrel.

That a keg or half barrel fell from defendant's wagon and struck and injured the plaintiff, when the wagon was crossing Emerald avenue, is not disputed. The contention of the plaintiff was, that the keg fell from the wagon upon the plaintiff while he was standing upon the street, waiting for the wagon to pass in front of him, without his touching the wagon, or anything that was on it, and that the keg alone inflicted the injuries. The contention of the defendant was, that the plaintiff got upon the keg or barrel which was swinging between the wheels on the north side of the wagon, or upon the hub of the north hind wheel of the wagon, and attempted to climb upon the wagon, and in so doing he pulled the keg down upon himself, and that he was knocked down and the wheel of the wagon ran over him and that a part of his injuries was caused by the wheel running over his legs.

The evidence for the plaintiff tended to show that the wagon of defendant was going east on 26th street in the north street car track; that when it reached Emerald avenue the driver turned his team to the south to go into the south

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track behind a car; that just at that time the plaintiff, then seven and a half years old, was crossing 26th street from the northeast corner of that street and Emerald avenue; that when he was between the street car tracks he looked up, saw the team coming from the west and stepped back, north, to the north track to let the team pass in front of him, and that as the hind wheels of the wagon passed over the north rail of the south track into that track a beer keg fell from the wagon and struck him; that the team of defendant was then going at a brisk trot; that one or more of the kegs on the top of the load rolled or moved from place to place or up and down as the wagon passed along. This is the substance of the testimony of the plaintiff and of four witnesses called by him, all of whom, according to their testimony, were in a position to see and observe the facts as to which they testified. As against and in substantial conflict with this testimony for the plaintiff is the testimony of eight or ten witnesses called by the defendant, to the effect that the plaintiff attempted to get upon the wagon while it was moving; that in so doing he got upon the hub of the hind wheel or upon the barrel which was suspended by the "tongs" between the wheels, and in trying to climb upon the wagon took hold of a keg and pulled it down upon himself. The defendant also gave evidence tending to show that the plaintiff and some of his witnesses had made statements in conflict with their testimony at the trial.

It would serve no useful purpose to examine here in detail the testimony of the witnesses. We have examined it carefully and arrived at the conclusion that the question whether the plaintiff came to his injury in the manner and from the cause testified to by him and his witnesses, or in the manner and from the cause testified to by the witnesses for the defendant, is a question upon which the verdict of the jury must be held conclusive.

The appellant further contends that if it be held that the jury might from the evidence properly find that a keg fell from the wagon upon the plaintiff as the wagon passed by him, without any one touching or interfering with the keg

before it fell, still the jury could not from such facts, taken in connection with the other evidence, find the defendant guilty of the negligence charged in the declaration. The testimony of the driver of the wagon, on his cross-examination as stated in the abstract, is as follows: "It is easy to throw a barrel off in turning in or out of the track. That is a thing we figure on: It is a thing that often happens. The faster you are going the more likely it is to fall off. A half barrel cannot be thrown as easily as a whole barrel. Turning in and out of a street car track will throw them off quicker than anything else." The driver testified that his team at the time of the accident was going "on kind of a jog or a fast walk;" five witnesses called by the defendant testified that the horses were going at slow trot, while the witnesses for the plaintiff testified that they were going at a brisk or fast trot.

From the evidence, the jury were warranted in finding as facts: that it was easy to throw a barrel or keg off from the wagon in turning in or out of a car track; that it was a thing which often happened; that the faster the wagon was going the more likely a keg was to fall off; that turning in and out of a car track would throw a barrel off quicker than anything else; that all this was known to the driver of the wagon and that yet, in driving along a public street of a great city, with a wagon loaded with empty barrels and kegs so placed and loaded that some of the kegs rolled and jumped up and down as the wagon went along, the driver, at a street crossing, turned into a car track when his team was going at a fast trot, and that in so doing a keg was jostled or thrown off from the wagon and upon the plaintiff, who was properly upon the street waiting for the wagon to pass so that he might cross the street behind it. We cannot say that from these facts the jury might not properly find, as facts, that the defendant was guilty of the negligence charged in the declaration and that such negligence was the direct cause of the injury complained of.

Complaint is made of the refusal of the court to give for the defendant the following instruction:

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“You are instructed that there is no evidence in this case from which it can reasonably be inferred that this defendant, Cooke Brewing Company, was not using ordinary care in respect to the rate of speed at which the team and wagon in question were driven at the time of the accident, and therefore, you should not hold the defendant negligent in that regard.”

We think that the question, whether the driver was using ordinary care in respect to the rate of speed in which he was driving his team, was upon the evidence a question for the jury, and that the instruction was therefore properly refused.

Complaint is also made of the refusal of the court to give for the defendant this instruction :

“It is claimed by the plaintiff herein that the driver of the team and wagon at the time of the accident was drunk, but you are instructed that even though you believe that this driver was at the time of the accident under the influence of liquor to the degree claimed by the plaintiff, yet you are instructed that his condition in that respect did not help to bring about this accident and you should not hold the defendant, Cooke Brewing Company, guilty of negligence in so far as the claimed intoxicated condition of said driver is concerned.”

Whether if the driver of the wagon was in fact intoxicated his condition helped to bring about the accident, was also a question of fact for the jury, and the instruction was therefore properly refused.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Henry L. Turner v. Osgood Art Colorotype Company.**Gen. No. 12,278.**

1. *CONTRACT—effect of construction of, by parties.* Where the terms of a contract are ambiguous and it appears that the parties thereto have by conduct construed the same, such construction will ordinarily be followed by the courts.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906.

MENZ I. ROSENBAUM, for appellant; GEORGE M. HOFHEIMER, of counsel.

LACKNER, BUTZ & MILLER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a judgment for \$2076.60 recovered against him by appellee in the Superior Court, upon his guaranty in writing that the American Soligraph Company would carry out a contract made by that company with the plaintiff.

In 1900 appellant was a banker in Chicago, doing business under the name of Henry L. Turner & Co.

September 7th of that year the following contract and guaranty in writing was executed by the parties thereto:

"Osgood Art Colorotype Co.,
City.

Chicago, Sept. 7, 1900.

Gentlemen: Regarding the matter of the pictures now in the course of completion by your company, we propose the following and offer for your acceptance: That on the acceptance of this agreement we will deliver to you a note signed by the American Consumers Alliance, Inc., and endorsed by Henry L. Turner & Company, amounting to \$1,741.50. In consideration of which you agree to deliver to us ten thousand (10,000) each of the pictures (16)

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sixteen subjects, as represented by the proofs now in our possession, at the earliest possible time and not later than October 15th, and on the delivery of the pictures to us, we will give you another note signed by the American Consumers Alliance, Inc., and endorsed by Henry L. Turner & Company for the amount of \$1,741.50. The two obligations to pay the account in full and both to mature January 1st, 1901.

In consideration of the several agreements above, it is fully understood that some changes are to be made on these plates according to the statement that was made by Mr. Behrens, that the plates could be altered.

Trusting you will find this satisfactory and we may have your acceptance at once, we are,

Very truly,
AMERICAN SOLIGRAPH COMPANY,
By J. A. Stevens.

We guarantee the execution of this contract by the American Soligraph Co.

HENRY L. TURNER & Co.

Accepted, Osgood Art Colortype Co.,
Frederick I. Osgood, Pres.,
C. J. Whipple."

The plaintiff delivered to the American Soligraph Company October 15, 1900, the number of prints specified in the above contract, and two days later that company wrote plaintiff as follows:

"Chicago, Ill., Oct. 17, 1900.

The Osgood Art Colortype Co.,
167 Adams St., Chicago, Illinois.

Gentlemen: We hereby notify you that we do not, and will not, accept the pictures which you have delivered to us, on account of the contract bearing date September 7, 1900, between the Osgood Art Colortype Co. and the American Soligraph Co. for the reason that they do not conform with said contract, and we hereby tender the same to you and hold them subject to your order, and assume no responsibility whatever for them.

We demand that you return to us, or the American Con-

sumers' Alliance immediately, the note of the American Consumers' Alliance, dated September 7, 1900, and due January 1, 1901. We further notify you that by reason of your failure to perform said contract, we shall lose a large sum of money, by reason of our inability to fill orders already taken from our customers and we shall hold you strictly responsible for all damages sustained by us, by reason of your breach of contract.

Yours truly,
AMERICAN SOLIGRAPH Co."

At the close of plaintiff's case defendant's counsel said to counsel for the plaintiff: "I think it ought to be stated that you are relying for recovery on the contract of September 7, 1900, upon which the defendant appears to be liable as guarantor," and plaintiff's counsel answered, "Well, that is all there is left of it, that and the prior contracts which were necessarily a part of that contract," and defendant's counsel replied: "They are merged, and their terms are simply merged; the degree of liability is changed and the character in which the defendant is liable; of course we understand, as far as that is concerned, that they may form a part of the contract of September 7, 1900."

We shall first consider the question as to how far, if at all, the prior contracts referred to by counsel were a part of the contract of September 7, 1900.

February 20, 1900, the defendant entered into a contract in writing with one J. A. Stevens, containing the following provisions:

"It is proposed to establish in Chicago a business covering the general ground of producing and selling art specialties and advertising novelties. To this end the said Stevens hereby agrees to devote his time, experience and effort for three months following this date, and the said Henry L. Turner & Co. agree to furnish for said purpose from time to time as requested by said Stevens during said period of three months the aggregate sum of \$600 in money, which is to be expended by said Stevens in his discretion after frequent consultation with Henry L. Turner & Co. in laying

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the foundation and preparing the way for said business, but including a reasonable allowance for current living expenses.

In case the results and prospects from said three months' effort and experience shall in the judgment of said Henry L. Turner & Co. warrant going forward with the business, they will make or provide for such further advances of capital for such business as they and the said Stevens shall jointly deem expedient.

Meanwhile during said three months a corporation named American Soligraph Company shall be organized with a stock capital of \$10,000, said stock to be paid up in full by the conveyance to said company of two certain applications for United States patents on processes connected with said business and devised by said Stevens, which applications are now being prepared.

Of the stock of said company Henry L. Turner & Co. and assigns shall receive and own sixty per cent. and said corporation shall after its organization and issuance of stock own and conduct said business; and the said Stevens shall be employed by said corporation as manager of the manufacturing and selling departments at a compensation to be agreed upon from time to time after the first year, such compensation for the first year following said three months' period to be at the rate of \$30 per week.

It is further agreed that such advances of money or capital as shall be made or provided for by Henry L. Turner & Co. shall be refunded before dividends are paid on the stock of the company."

April 12, 1900, plaintiff submitted to defendant the following proposition:

"Gentlemen: Answering your request for estimate we beg to quote you as follows:

We propose to furnish reproductions by our colortype process of sixteen (16) oil paintings, and print 10,000 copies of each subject; the color plates to measure not exceeding 11x16 inches, background to be a solid tint, full size of sheet viz.: 13x19 inches, and these backgrounds to be run in four different colors in addition to the three colors used in colortype printing; in other words, four subjects

will have the same color background, we to deliver in sheet containing four subjects each. Paper stock to be used to be equal to 25x38-100 lbs., coated one side only; Price \$4,700.00; 20,000 copies of same \$6,000.00.

Reproductions of sixteen (16) entirely different subjects from above, colortype plates to measure not exceeding 8x12 inches and 10,000 copies of each printed in the same manner as the larger and delivered in full sheets \$2,610.00; 20,000 copies of same \$3,400.00. * * *

The prices quoted above are for the very finest colortype reproductions which can be made from copies you furnish us to work from. We are prepared to take this work in hand immediately and give it our prompt and most careful attention. The writer promises to superintend the work and make every effort to give you artistic and striking results.

We trust that quality considered you will find our prices satisfactory, and we hope to be favored with your order."

April 13, 1900, plaintiff submitted to defendant another proposition in writing, at the foot of which defendant attached his acceptance thereof and returned the same to plaintiff. Said proposition and acceptance are as follows:

"Gentlemen:—

Agreeable to your request for new estimate on the 13x19 and 10x14 inch pictures we beg to quote you as follows:

We propose to furnish 10,000 of each of eight subjects of the larger size, run in colortype with background, for \$2,500.00. Additional 10,000 of each of eight subjects at the same time \$675.00—2 backgrounds, 10,000 each of eight subjects of the 10x14 inch size \$1,370.00. Additional 10,000 of each of eight subjects at the same time \$425.00.

Other conditions mentioned in our previous estimate to remain as therein stated. We agree to complete these two lots of 10,000 or 20,000 each as you may decide, in the shortest space of time possible, and give you at least 200 copies of each subject of each size June 1st, providing one-half of the sixteen copies are put in our hands between now and the first of May, and that the last copy reaches us not later than the 15th of next month. There is considerable work on

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the plates, and we should be given all the time possible to insure a first-class job.

Hoping to be favored with your order, we are

Yours truly,

OSGOOD ART COLORTYPE Co."

"Subsequent runs of 10,000 copies \$900.00; 20,000 copies \$1,650.00 on the 13x19 size, this way to provide for four different colored backgrounds.

On the 10x14 inch size, subsequent runs of 10,000 will cost \$595.00; 20,000, \$1,100.00. These prices also provide for four background colors.

OSGOOD ART COLORTYPE Co."

C. J. W."

"Accepted as to the 1st 10,000 each with the privilege of increasing order to 20,000 on each sheet before run is finished.

HENRY L. TURNER & Co."

May 14, 1900, an application for a license to form a corporation under the name of the American Soligraph Company was made to the Secretary of State and a license issued. June 28, 1900, the commissioners filed in the office of the Secretary of State their report showing that the stock had all been subscribed, and directors of the corporation elected.

Some time in May, 1900, plaintiff completed plates and the borders or backgrounds therefor of each of the sixteen pictures mentioned in the contract of April 13, took two or three proof impressions from each plate and delivered them to Stevens. Stevens soon afterward returned one set of the proofs to plaintiff with the endorsement, "O. K. for color-type and border. J. A. Stevens," on each. The contract of April 13th provided that plaintiff should furnish defendant 200 prints from each plate June 1st, and about that time plaintiff delivered to Stevens for defendant 200 prints from each plate, 3200 in all. In June, 1900, some time after they were received by Stevens, he returned them to the plaintiff and asked plaintiff to rough or emboss them to see

how they would look, and plaintiff embossed the prints and returned them to Stevens.

As has been said, the American Soligraph Company completed its organization June 28, 1900. Up to that time Stevens had charge of the business, which was then transferred to said corporation for the defendant, under the contract of February 20, 1900. After June 28th he continued in charge of said business as the manager of said corporation.

The terms of the contract of April 13, 1900, made by the acceptance by the defendant of the proposal of the plaintiff, are not found alone in that proposal and acceptance, for that proposal states that: "the other conditions mentioned in our previous estimate to remain as therein stated." To ascertain the terms of the contract of April 13th, reference must be had to the estimate or proposal of April 12th and also to that of April 13th.

The proposal of the American Soligraph Company to the plaintiff made in its letter of September 7, 1900, begins as follows: "Regarding the matter of the pictures now in the course of completion by your company." The pictures so referred to were in the course of completion by the plaintiff under the written contract of April 13th between the plaintiff and the defendant. That contract was made by the defendant in the prosecution of the business, "of producing and selling art specialties and advertising novelties," provided for in the contract between defendant and Stevens of February 20, 1900. That business was by the provisions of that contract to be taken over by the American Soligraph Company when that corporation should be organized; the money advanced by Turner to Stevens was to be used by Stevens "in laying the foundation and preparing the way for said business," and was to be repaid to Turner, by the Soligraph Company, "before dividends were paid on the stock of that company." The evidence proves beyond all question that the purpose and intention of the defendant was, not to engage in the business of "producing and selling all specialties" himself, but was, through Stevens,

“to lay the foundation and prepare the way” for such business to be carried on by the American Soligraph Company, which was to be organized for that purpose; that the contract of April 13, 1900, was made by the defendant in furtherance of such purpose and intention; that the Soligraph Company was then organized and incorporated to carry on said business; that Stevens subscribed for 48 of the 50 shares of its capital stock; that the first meeting of stockholders to elect directors was held at the office of the defendant June 7, 1900, and that defendant was then elected one of the three directors of said company; that Stevens had at all times the control and management of said business, up to June 28th, under his contract with Turner, and after that time as manager of the Soligraph Company.

The only conclusion that can justly be drawn from the evidence in this record is, that the contract of April 13, 1900, was in fact made for the benefit of the Soligraph Company; that by consent of both the plaintiff and defendant the Soligraph Company when incorporated took the place of Henry L. Turner in his contract with plaintiff; and from that time was, by both plaintiff and defendant, dealt with and treated as a party to said contract in place of Turner, and we think that in determining the kind and quality of the prints the plaintiff was bound to furnish to the Soligraph Company and that company was bound to accept from the plaintiff under the contract of September 7th, reference must not alone be had to the contract of September 7th, but also to the contract of April 13th, between plaintiff and defendant Turner. The provisions and specifications contained in the proposal of April 12th as to the prints thereby proposed to be produced by the plaintiff for the defendant became, as we have said, a part of the proposal of April 13th and of the contract made by the acceptance by the defendant of that proposal unless modified or superseded by the proposal of April 13th, and the provisions and specifications in relation to said prints contained in the contract of April 13th between plaintiff and defendant became a part of the contract of September 7th, between

plaintiff and the Soligraph Company, upon which defendant is liable as guarantor, unless modified or superseded by the terms and provisions of the contract of September 7th. The prices fixed by the two contracts were different. By that of April 13th the price for

10000 prints from each of 8 13x19 plates was	\$2500
10000 prints from each of 8 10x14 plates was	1370 3870.00
Deduct 10/100.....	387.00

and we have.....\$3483.00

The contract of September 7th fixed the price for 10000 prints from each of the 16 plates at \$3483, payable in two notes for \$1741.50 each. The contract of September 7th also altered the time of the delivery of the prints. But the only provision in the contract of September 7th that can be held to affect the provisions of the contract of April 13th as to the kind and quality of the prints the plaintiff was to produce is the following: "In consideration of the several agreements above, it is fully understood that some changes are to be made in the plates according to the statement of Mr. Behrens that the plates could be altered."

Under this clause the plaintiff was bound to make the changes in the plates requested by the Soligraph Company which Behrens said could be made. In all other respects the specifications and provisions of the contract of April 13th in relation to the prints must be held to be a part of the contract of September 7th.

We shall next consider the question whether the plaintiff performed the contract of September 7th. That it delivered to the Soligraph Company on October 15th, 10000 prints from each of the 16 plates as provided in the contract was clearly proved and is not now disputed by appellant. Many of the transactions in relation to the prints were had by officers or agents of the plaintiff with Stevens. Stevens was not called as a witness at the trial and the testimony of the officers and agents of the plaintiff as to transactions with him was not contradicted. That Stevens immediately

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after September 7th, 1900, pointed out and specified to the plaintiff the changes the Soligraph Company desired the plaintiff to make in the plates, in accordance with the contract of September 7th, and that such changes were at once made, is clearly proved by the evidence for the plaintiff and there is no evidence to the contrary. Indeed the claim, so much insisted upon for the defendant at the trial, that such changes were not made, as well as that the prints delivered were upon paper of less than the agreed weight, must be regarded as abandoned by appellant, for neither claim is stated or referred to in the brief or argument for appellant in this court.

The contention of appellant is that the evidence fails to show that the plaintiff performed the contract of September 7th. First, because the prints delivered October 15th had not been roughed or embossed; second, that some of said prints had purple, the remainder green borders, and the plaintiff ought to have delivered some prints with green, some with purple, some with red and some with yellow borders; third, that upon the borders of some of the prints delivered were little specks.

As to the specks in the borders it is sufficient to say that the borders are from two to four and a half inches wide; that the specks in the borders of the prints put in evidence by the defendant are exceedingly small specks, such as may usually be found upon close inspection in any solid color printing of any considerable size, and such as without such close inspection would not be seen or noticed, and that the evidence shows that such specks are not due to defects in the plates or to improper printing, but are caused by occasional dust particles in the air and cannot be avoided.

The contention of appellant that the plaintiff was bound to deliver to the Soligraph Company prints with backgrounds or borders in four different colors and that those delivered were in two different colors only, is without merit. Under the contract of April 13th, plaintiff was bound to deliver to Turner prints with two different backgrounds, if the latter took 10000 prints from each plate, and with four differ-

ent colored backgrounds if he took 20000 prints from each plate, and this provision was not modified by the contract of September 7th and therefore forms a part of that contract. The contract of September 7th was for only 10000 prints from each plate and the plaintiff was therefore not bound to furnish to the Soligraph Company prints with four different borders, but only prints with two different colored borders.

Again, if upon any possible theory it could be held that the plaintiff by the contract of September 7th agreed to furnish to the Soligraph Company 10000 prints from each plate with four different colored borders, it would be for that company to designate how many, if any, of such borders it desired the plaintiff to print in each of the four colors, and the evidence is undisputed that immediately after September 7th, Stevens, the manager of the Soligraph Company, directed the plaintiff not to print any borders in red or yellow, but to print some of the borders in green and the remainder in purple, and the borders were so printed.

It remains to consider whether the Soligraph Company was justified in rejecting the prints because they had not been roughed or embossed.

The contract of September 7th contains the following provision: "You (the plaintiff) agree to deliver to us (the Soligraph Company) 10000 each of the pictures, sixteen subjects, as represented by the proofs now in our possession." Appellant contends that the word "proofs" in the clause above quoted "must have referred to the roughed pictures of the 3200 delivery, of which the Soligraph Company had a large number and Turner had a set," and that therefore the contract of September 7th required the plaintiff to deliver to the Soligraph Company roughed or embossed prints. The word "proofs" in relation to prints or engravings has a definite and well settled meaning. "An impression taken from an engraved plate to show its progress during the execution of it," is a proof. Cent. Dic. Plaintiff, when the plates were first made, sent to Stevens two or three sets of "proofs" from each plate. Stevens returned one set ap-

proved by him, and so far as shown by the evidence he retained the other set, or two sets if three sets were delivered, and they were in the possession of the Soligraph Company, or of Stevens, its manager, when the contract of September 7th was made. That contract was between plaintiff and the Soligraph Company, not between plaintiff and Henry L. Turner. Turner only guaranteed that the Soligraph Company would perform its contract. The words "our possession" in the contract refer to the possession of the Soligraph Company, not to the possession of Turner, and the phrase "proofs now in our possession," we think, refer to the one or two sets of "proofs" that were delivered by plaintiff to Stevens and retained by him when he returned one set to the plaintiff with his "O. K." thereon, and do not refer to the 3200 sample prints that were delivered to Stevens long after the "proofs" were delivered. The "proofs" were not roughed or embossed, and if we are correct in our conclusion that the word "proofs" in the contract refers to and means the "proofs" and not the sample prints that were delivered by plaintiff to Stevens, it is clear that the contract of September 7th did not impose upon the plaintiff the obligation to emboss the prints.

But if the word "proofs" in the contract of September 7th means and refers to the sample prints, still it cannot, in our opinion, be held that the plaintiff in that contract agreed to emboss the prints. The transaction of September 7th was not a sale by sample. The provision, "You agree to deliver to us 10000 each of the pictures, sixteen subjects, as represented by the proofs now in our possession," identifies and points out what prints the plaintiff thereby agreed to deliver, and cannot be held to import or imply an agreement on the part of the plaintiff that the prints which it thereby agreed to deliver should be embossed because the sample prints therein called "proofs" were embossed.

The contention that by the contract of April 13th the plaintiff agreed to furnish embossed prints cannot be sustained.

The proposals of April 12th and 13th are in much detail.

They specify the number of colors in which the plate of the painting to be copied shall be printed, the sizes of such color-type plates, the sizes of the backgrounds, the weight of the paper, the number of impressions that shall be upon each sheet when delivered, etc.

The first clause of the proposal of April 12th is, "We propose to furnish reproductions by our colortype process of sixteen oil paintings and print 10000 copies of each subject," and neither in that proposal nor in that of April 13th is any mention made of embossing or roughing the prints. The roughing or embossing of a print is no part of the making or engraving of the plate nor of the printing of impressions, "prints," from the plates. When a print is to be embossed it is, after the printing is completed, passed between a revolving steel cylinder with a rough surface and a roller, and the effect is to slightly roughen the surface of the paper of the print. It is, we think, clear that under the terms of the contract of April 13th the prints were to be delivered as they were printed, that it was no part of that contract that plaintiff should emboss the prints after they were printed. This was the construction the parties themselves put upon the contract. The contract of April 13th provided that 200 copies of each plate should be delivered by June 1st. These copies were to be used by canvassers employed to take orders for calendars, in the making of which the prints were intended to be used. These sample prints, 3200 in all, were delivered to Stevens about June 1st, not roughed or embossed, but in the condition that they came from the printer. Stevens returned them a few days later to the plaintiff with a request that plaintiff emboss them so that he might see how they would look after they were embossed. Plaintiff embossed the 3200 sample prints and returned them to Stevens and Stevens then requested the plaintiff to give him a price for embossing the 160,000 prints ordered by Turner April 13th, and plaintiff gave him a price of \$4 per thousand. This offer Stevens declined, saying that he could have the prints embossed elsewhere for \$3 per thousand. Stevens represented Turner in his deal-

ings with the plaintiff up to the time the Soligraph Company was organized, and thereafter represented that company as its manager. He signed the contract of September 7th for the Soligraph Company. In that contract was inserted the provision in relation to the alterations in the plates, but neither in that contract nor in the negotiations that preceded the making of that contract was anything said about embossing the prints.

It follows from what has been said that, in our opinion, the plaintiff was not bound, expressly or by implication, either by the contract of April 13th or by that of September 7th, to emboss the prints.

The evidence admitted on the part of the plaintiff, of a custom not to emboss prints in the absence of a special order or agreement that they should be embossed, was not harmful to the defendant.

The evidence, in our opinion, proves that the plaintiff complied with the contract of September 7th and fails to prove any good cause or excuse for the refusal of the Soligraph Company to accept the prints that were tendered to it by the plaintiff, and we do not find reversible error in the rulings of the court upon the evidence or the instructions.

The judgment of the Superior Court will be affirmed.

Affirmed.

Herman L. Kenyon v. Ida H. Manley.

Gen. No. 12,285.

1. TRANSCRIPT—*when confers jurisdiction.* Notwithstanding an action before a justice of the peace has been tried by another justice than the one upon whose docket it was pending, the transcript of such latter justice confers jurisdiction upon the circuit or superior court upon appeal.

2. JURISDICTION—*when objection to, comes too late.* An objection to the jurisdiction of the circuit or superior court to hear an appeal from a justice of the peace, where predicated upon the alleged insufficiency of the transcript, comes too late when first alleged in the appellate court.

3. *LEASE—cannot be modified by parol.* The terms of a written lease cannot be modified by a subsequent parol agreement.

4. *FORCIBLE DETAINER—when five days' notice not essential to maintenance of.* Forcible entry and detainer to recover possession of premises for nonpayment of rent may be maintained without the prior giving of a five days' notice to quit where such notice is waived in the lease.

Forcible entry and detainer proceeding. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906.

Statement by the Court. Appellee brought an action of forcible detainer against appellant before JUSTICE EVERETT. JUSTICE EVERETT being unable to attend at the trial, requested JUSTICE MARTIN to hear the case for him, and JUSTICE MARTIN heard the case, rendered a judgment for the plaintiff, and the defendant appealed to the Superior Court. The transcript of the judgment filed in the Superior Court was certified by JUSTICE EVERETT. The parties went to trial in the Superior Court without objection, and there was a verdict for the plaintiff and judgment thereon, from which the defendant prosecutes this appeal.

ERNEST SAUNDERS, for appellant.

PETIT, PARKER & KOFF, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

It is contended by appellant that the Superior Court had not jurisdiction of the subject-matter of the suit because the transcript of the judgment of the justice of the peace was certified by JUSTICE EVERETT, the justice before whom the action was pending, and not by JUSTICE MARTIN, the justice who heard the cause and rendered the judgment. The statute provides that in case one justice hears a cause at the request of the justice before whom the cause is pending, that he shall "hear the cause instead and in behalf of the justice calling him; and the judgment so entered shall have the same force and effect as if rendered by the justice before whom

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the action is pending." R. S., chap. 79, sec. 56. In such a case, we think, the judgment was properly entered on the docket of the justice before whom the action was pending and the transcript was properly certified by that justice. The appellant appeared and went to trial in the Superior Court without any objection and cannot be heard now to object to the insufficiency of the transcript. *Hanchett v. Williams*, 24 Ill. App., 56.

The lease in evidence is under seal and provides that the rent shall be paid in advance in monthly payments of \$20 each, on the first day of each month. The trial court did not err in excluding evidence of a subsequent parol agreement, that the tenant might pay the rent at any time between the first and tenth days of the month. *Alschuler v. Schiff*, 164 Ill., 298.

By the terms of the lease the tenant waived "notice to terminate the tenancy," and hence it was not necessary for the landlord to give to the tenant the five days' notice required by the statute. *Epsen v. Hinchcliff*, 131 Ill., 468; *Belinski v. Brand*, 76 Ill. App., 404.

The judgment of the Superior Court will be affirmed.

Affirmed.

**B. A. Rallton v. Chicago Title & Trust Company,
Trustee.**

Gen. No. 12,297.

1. **BANKRUPTCY ACT**—*rights of mortgagee when sale to has been set aside as made with attempt to hinder creditors.* If a sale be set aside, at the instance of a trustee in bankruptcy, as fraudulent under the Bankruptcy Act, the fact that the fraudulent vendee prior to accepting absolute transfer had a mortgage upon the same property, will not entitle him to a lien thereon.

Action of assumpsit. Appeal from the Superior Court of Cook County; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906.

Statement by the Court. Edward M. Sanders filed his petition in bankruptcy April 28, 1902, in the District

Court of the United States for the Northern District of Illinois, was adjudged bankrupt, and appellee was appointed trustee of the bankrupt estate.

Appellee as such trustee then brought an action against appellant in the Superior Court to recover the value of a stock of groceries, horses, wagons, etc., transferred by the bankrupt to appellant April 13, 1902, within four months prior to the filing of the petition, upon the ground that such transfer was made by the bankrupt with the intent and purpose to hinder and delay his creditors and that appellant was not the purchaser thereof in good faith and for a present consideration. The plaintiff recovered a judgment for \$1050 against the defendant, from which judgment the defendant prosecutes this appeal.

WALKER & WILLIAMS, for appellant.

WHEELER, SILBER & ISAACS, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

From 1897 to April 14, 1902, Sanders, the bankrupt, had a retail grocery store in Chicago. He purchased goods from appellant, a wholesale grocer, and January 7, 1898, gave him a note and a chattel mortgage to secure the same, upon his stock of goods and other property used in his business. When this note became due a new note and mortgage were given in renewal, which in time were renewed by a new note and mortgage which became due January 7, 1902. On that day Sanders gave to Railton a note for \$750 and a chattel mortgage to secure the same, in renewal of the former note and mortgage, upon the fixtures and utensils connected with his grocery business, three horses, three wagons, harness and all the stock of groceries then in his store at 204 Thirty-ninth street, Chicago, and all the stock, fixtures, etc., which he might thereafter place in his said store.

April 13, 1902, Sanders was in fact insolvent. He owed more than \$4000, and his property consisted of his grocery store, horses, wagons and fixtures, which were transferred

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to appellant on that day and sold by him the next day for \$1050. Sunday, April 13, 1902, Brennan and Mullen were at the store with Sanders, negotiating with him in reference to a sale of the property of Sanders to Brennan. Mullen was a salesman in the employ of Walsh, Boyle & Company, to whom Sanders owed \$188. Brennan offered Sanders \$1100 for the property and Sanders declined the offer. Mullen then said to Sanders, "We will make you do business." After Brennan and Mullen went away, Sanders went with his lawyer to Railton's house and there, at eleven o'clock Sunday night, a bill of sale of said property from Sanders to Railton was executed by Sanders and delivered to Railton for an expressed consideration of \$489.66, which included the amount due from Sanders to Railton, on open account \$389.66 and \$100 added for interest on that amount and other amounts theretofore paid by Sanders to Railton. Railton took possession of the property the following morning. The same morning Walsh, Boyle & Company sued out an attachment against Sanders for \$188, levied upon the property and put a custodian in the store. Railton thereupon, without consulting Sanders, sold the property to Brennan for \$1050 and out of the proceeds paid Walsh, Boyle & Company the \$188 Sanders owed them, and the levy under the attachment was released. Railton paid to Sanders' lawyer \$50 claimed by him to be due for his services to Sanders in relation to said sale, made some allowance or deduction for rent, so that he claimed that the difference between the amount he received from Brennan, \$1050, and the amounts paid by him out of the money so received, added to \$489.66 he claims he was entitled to from the bankrupt, was \$345.35, and this amount with the costs he tendered to the plaintiff. The clauses of the Bankrupt Act concerning transfers in fraud of creditors are:

"Section 67e: That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition,

with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankruptcy."

Section 70a, subsd. 4, 5, which read substantially as follows:

"The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (4) property transferred by him in fraud to his creditors; (5) property which, prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *"

"Section 70e: The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value."

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An explanation of the incorporation into the Bankrupt Act of the provisions of sections 67 and 70 above quoted is given in *In re Mullen*, 101 Fed. Rep., 413-415, but it is not material in this case to inquire whether the provisions of the two sections can be so interpreted and arranged as to be altogether free from contradiction, repetition or redundancy. Section 70e gives to the trustee of the bankrupt estate such rights as the creditors of the bankrupt or any of them possessed to set aside and avoid fraudulent transfers of his property made by the bankrupt without regard to the time when such transfer was made. Section 67e gives him such power where the transfer was made within four months prior to the filing of the petition in bankruptcy, and as the transfer in this case was made within that period, the provisions of both sections are applicable. We shall not stop to examine in detail the evidence in the record, which in our opinion is abundant to warrant the jury in finding that the bill of sale was made and the property transferred by Sanders to Railton with the intent and purpose on the part of Sanders to hinder and delay his creditors and to secure and reserve to himself a secret interest in the property so transferred, although the bill of sale upon its face purported to transfer the property absolutely to Railton, and that such intent and purpose on the part of Sanders were known to Railton, and that he accepted such transfer to aid Sanders to carry out such intent and purpose.

The contention that if the transfer was made to hinder and delay creditors, Railton may be regarded as a mortgagee in possession of the mortgaged property and therefore entitled to a lien thereon for the amount due under the mortgage of January 7, 1902, cannot be sustained. The mortgage was abandoned by the act of the parties. Railton did not take possession of the property on April 14th, and sell the same as mortgagee under the mortgage, but under what purported to be an absolute sale and transfer of the property to him and he resold the property to Brennan on April 14th, without the knowledge or consent of the bankrupt,

although the bankrupt appears subsequently to have ratified or assented to such sale.

The property so sold was not under the statute of Illinois specifically exempt from execution. If it had been levied upon under an execution against the bankrupt he might have made a schedule of all of his property and selected articles, the aggregate value of which did not exceed the amount to which he was entitled, and he may now, perhaps, be entitled to have his exemptions set apart to him out of the proceeds of this judgment when collected; but this must be done by the trustee, under the provisions of the Bankrupt Act, under the control and directions of the bankrupt court.

We find no reversible error in the rulings of the court upon questions of evidence or instructions.

The judgment of the Superior Court will be affirmed.

Affirmed.

American Brake Shoe & Foundry Company v. Peter Toluszis.

1. **MASTER—duty of, to warn inexperienced servant.** It is the duty of a master to warn an ignorant and inexperienced servant of dangers not open, apparent and to be foreseen and appreciated by such a servant.

2. **ASSUMED RISK—when doctrine of, applies to inexperienced servant.** An inexperienced servant temporarily engaged in more hazardous work than that for which he has been employed, takes upon himself all such risks incident to such work as are equally open to the observation of himself and his master.

Action on the case for personal injuries. Appeal from the City Court of Chicago Heights; the Hon. HOMER ABBOTT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed, with finding of facts. Opinion filed March 23, 1906. Rehearing denied April 17, 1906.

Statement by the Court. This is an appeal by the defendant from a judgment for \$1000 recovered against it in the City Court of Chicago Heights by the plaintiff, in an action on the case for personal injuries sustained by

the plaintiff while operating a stamping or shaping machine for the defendant. The ground of recovery alleged in the declaration was, that the plaintiff was inexperienced in the use of machinery, was employed by the defendant as a laborer, and had no knowledge of the danger attending the operation of said stamping machine, and was negligently, etc., ordered by the defendant to operate said machine without the defendant informing him of the danger attendant upon its operation or instructing him how to operate it, and that while so operating said machine, with due care, etc., two fingers of his left hand were caught in said machine and so injured that it was necessary to amputate them.

HORTON & BROWN, for appellant.

GEORGE A. BRINKMAN and PAUL P. HARRIS, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The stamping machine in question had an iron frame on the top of which a die plate, which carried the male die, moved horizontally in slides or guides. At one end of the frame was fastened a stationary die plate which carried the female die. The machine was driven by electricity, which drove a large driving wheel, and the circular motion of that wheel was changed into reciprocating motion by cranks. There was a crank rod on each side of the driving wheel which led from a crank pin to the male die plate, which is called a plunger. With each revolution of the driving wheel the plunger was pushed forward until the male die entered the female die and was then drawn back to the other end of the frame and then pushed forward again. The pinion which communicated the power to the driving wheel was raised and lowered by a lever by means of which the man in charge of the machine could throw the machine out of gear and stop the stroke of the plunger at any time. The "throw" of the machine was two feet; that is, the plunger moved forward two feet and backward two feet with each revolution of the driving wheel, and that

wheel revolved from ten to fifteen times per minute. The machine, its movements and the mechanism which caused such movements, were all uncovered and exposed to view.

The plaintiff before the day of the accident had been in the service of the defendant as a laborer. On the morning of that day he was put to work on said stamping machine. His duty was, as the plunger moved backward from the female die, to take from a barrel pieces of tin with his right hand and with the other hand place them, one by one, in front of the female die. When the male die came forward and stamped the plates they were expected to fall down between the sides of the frame of the machine without any person touching them. The foreman of the defendant, who directed the plaintiff to go to work upon the stamping machine, according to the testimony of the plaintiff, showed him how to operate the machine and put one piece of tin through the machine. Plaintiff worked on the machine three or four hours and stopped it once by using the lever. Then in putting the pieces of tin in front of the female die, one of the pieces fell down and he attempted to set it up again, and to do so put his hand in front of the female die and while it was there the plunger came forward and caught his fingers between the male and female die and injured them. Upon his cross-examination plaintiff testified as follows:

"Q. The head and foot of this machine came flat together, did they not?

A. Came together and in that way it (the tin) gets bent.

Q. You can see them come together, can't you?

A. Yes, you can see it.

Q. You knew if that came together with your fingers in there, that would cut your fingers off, didn't you?

A. Well, I straightened up that piece of tin, and at that time they caught my fingers and cut them off. It was laying flat and I went to straighten it up.

Question repeated.

A. Yes, of course, if it came together it would cut my fingers.

Q. You could see it coming together?

A. Well, I see it, that machine comes together and is going to bend those pieces."

The plaintiff was ignorant and inexperienced and this was known to the defendant when it put him at work upon the machine. It was therefore the duty of the defendant to warn the plaintiff of dangers not open, apparent and to be foreseen and appreciated by an ignorant and inexperienced person in the operation of the machine. On the other hand, no duty rested upon the defendant to warn the plaintiff of dangers which were open, apparent, foreseen and appreciated by him. *C. & A. R. R. Co. v. Bell*, 209 Ill., 25.

"Where a servant is temporarily engaged in more hazardous work than that for which he was employed, he takes upon himself all such risks incident to the work, as are equally open to the observation of himself and the master." *Consolidated Coal Co. v. Haenni*, 146 Ill., 614-625.

In this case the danger was apparent. The plaintiff while at work stood by the side of the machine. The machine was entirely open and uncovered. The plunger which carried the male die rested upon the top of the sides of the frame of the machine and was held in place by a flange which projected inward from that part of the plunger which passed outside of and below the top of the frame and under a flange which projected outward from the top of the sides of the frame. With every revolution of the driving wheel this plunger moved forward to the head which carried the female die and then backward to the point farthest removed from that head. The danger resulting from the operation of the machine was not only obvious and apparent, but, as appears from the testimony of the plaintiff, was known and appreciated by him. He testified that he could see the die heads coming together and knew that if they came together when his fingers were between them, his fingers would be cut off.

Against the danger of permitting his finger to be between the die heads when they came together it was in the nature of things impossible to protect the plaintiff. He must use his fingers to put the pieces of tin in place. The only dan-

ger connected with the operation of the machine was the danger, or rather certainty, of injury, if the plaintiff permitted his finger to be between the die heads when they came together. Plaintiff knew that he would be injured by the die heads coming together as they did while his fingers were between them, and as such danger was open, apparent and known and appreciated by the plaintiff, it was not the duty of the defendant to warn plaintiff that it was dangerous for him to permit his fingers to be caught between the die heads when they came together, and its failure to so warn him was not negligence.

The judgment will be reversed with a finding of facts.

Reversed with finding of facts.

Louis Greenberg, et al. v. The People of the State of Illinois, for the use of Augusta Balaban.

Gen. No. 12,804.

1. **VARIANCE—*what not.*** Where the declaration in an action upon a constable's bond avers that the defendant "had been duly elected as a constable of the county of Cook" and the bond recites that he "had been duly elected a constable in and for the town of North Chicago in the county of Cook," there is no variance.

2. **TRANSCRIPT—*when competent, notwithstanding not sealed by justice.*** A transcript of a justice of the peace which is not under seal is competent where such justice appears and testifies that the same was a transcript of his docket and bears his signature.

3. **ASSIGNMENT OF ERRORS—*effect of joint.*** The assignments of error are regarded as a declaration, each assignment as a count of the declaration, and a joint assignment must set forth error available to all who join in it; if not good as to all it is not good as to any.

4. **ASSIGNMENT OF ERRORS—*when joint, available to any defendant.*** Where a judgment appealed from is joint and if reversed as to one defendant must be reversed as to all, all of the defendants may, upon a joint appeal and joint assignment of error, take advantage of any error committed against any one of the defendants on the trial.

5. **CONSTABLE'S BOND—*when recovery may be had upon.*** Recovery may be had upon a constable's bond where he is guilty of official misconduct connected with the levy of an execution, even though the act in question was malicious.

Greenberg v. The People.

Action of debt. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed. Opinion filed March 23, 1906. Rehearing denied March 30, 1906.

Statement by the Court. This is an appeal by the defendants from a judgment for \$10,000 debt and \$800 damages recovered upon a constable's bond.

The husband of Augusta Balaban had a retail grocery store in Chicago and his wife assisted him in the store. A judgment was recovered against him before a justice of the peace and an execution issued thereon and placed in the hands of Constable Greenberg. Greenberg went to the store to make a levy under the execution. He produced and laid upon the counter a paper which he said was a copy of the execution upon which was endorsed the amount of the judgment, \$3.90, and certain items of costs making the amount of judgment and costs \$10.70. He took certain goods from the shelves and placed them in barrels and boxes. The judgment debtor then attempted to make a schedule and his wife went to a box in which Greenberg had placed a part of the goods taken by him from the shelves. She leaned over the box to see what was in it and Greenberg pushed her away. She stooped down again and he picked up the box, and in doing so the box struck her on the abdomen. She was then far advanced in pregnancy and three days later gave birth to a still born child. The sum of \$9.40 was then paid to Greenberg and he endorsed upon the copy of the execution the following receipt: "Received the sum of \$9.40 in full settlement of the within judgment and costs. Levy released.

"Louis Greenberg, Constable."

The declaration is in the usual form of a declaration in debt upon an official bond. In the assignment of a breach of the condition of the bond, the facts above stated are set out in much detail and it is then averred that while Augusta Balaban "was in the act of assisting said Balaban, her husband, or his agent in that behalf, to prepare said schedule

to be given to said Louis Greenberg, as aforesaid, he, the said Greenberg, as a constable, then and there, acting under said writ of execution and by color of his office of constable as aforesaid, attempted to prevent the said Balaban or his agent in that behalf from making up said schedule, and in so attempting to prevent and while interfering with and preventing said Augusta Balaban from counting the articles and items of property levied upon, as aforesaid, by said Greenberg, he, the said Greenberg, wilfully and maliciously assaulted said Augusta Balaban and wilfully and maliciously committed a battery upon her, and then and there wilfully and maliciously struck her violently in the abdomen with a large box containing merchandise, and otherwise brutally beat and maltreated her."

The plea of all the defendants *inter alia*, denies that said Greenberg, while acting under the writ of execution and by color of his office as constable, committed the assault and battery upon said Augusta Balaban as charged in the plaintiff's declaration.

he defendants offered no evidence at the trial.

EDWARD K. MORRIS, for appellants.

WHEELER, SILBER & ISAACS, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

The objection that the trial court erred in admitting the bond in evidence because the declaration averred that the recital in the bond was that Greenberg "had been duly elected as a constable of the county of Cook," while the recital in the bond is that he "had been duly elected a constable in and for the town of North Chicago in the county of Cook," is without merit. A constable, though elected by the voters of a town, is a constable of the county in which said town is. His certificate of election is issued by the county clerk; in case of a vacancy in the office, if the unexpired term is less than a year, the county board fills the vacancy; the writs issued by a justice of the peace run "to any constable of

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said county.” There is no substantial variance between the averment of the declaration and the recital of the bond.

The transcript of the judgment admitted in evidence over the objection of the defendants, was under the hand, but not under the seal of the justice. The justice of the peace was called as a witness and testified that the transcript offered was a transcript of his docket and signed by him, and we think it was properly admitted in evidence. Nor do we think that the court erred in admitting in evidence the paper purporting to be a copy of the execution under which Greenberg was acting. It was the copy which Greenberg gave to the judgment debtor and to which he attached his receipt and release of levy. The transcript of the judgment states that an execution was issued upon the judgment to Constable Greenberg. There is no evidence that the execution was ever returned and the defendants were notified to produce it upon the trial.

It is argued in behalf of appellee that the constable was certainly liable upon his own bond, that the sureties, in order to bring before this court the question of their liability on the bond, should have severed from the constable in their assignments of error, and having joined with him therein they cannot have the benefit of any error so assigned that is not equally good as to him.

The assignments of errors are regarded as a declaration; each assignment as a count of the declaration and a joint assignment must set forth error available to all who join in it. If not good as to all it is not good as to any. But this rule has no application to the facts of this case. If, under any possible state of facts, the constable could be held liable, on his bond, for an act, and the sureties not held liable for that act, in this case the defendants were sued jointly and the plaintiff must recover against all of the defendants or none. The judgment is a joint judgment and if erroneous as to one or more of the appellants must be reversed as to all. The right of each defendant in the case was affected by any error committed upon the trial, and all of the defendants may, upon a joint appeal and joint assignment of error, take advantage of any error committed

against any one of the defendants upon the trial. "The assignment of errors should be considered as joint and several, or joint or several, according to the nature of the error assigned and as affecting the respective plaintiffs in error." *Fisher v. Thirkell*, 21 Mich., 1-24; *Greenman v. Harvey*, 53 Ill., 386.

The allegation of the declaration is, that the act which caused the injury to Augusta Balaban was done wilfully and maliciously by the constable, "acting under said execution and by color of his office as constable." The statute in force at the time the bond was executed provides that a constable's bond "shall be made payable to the people of the State of Illinois, and shall be held for the security and benefit of all suitors and others who may be injured by the official acts or misconduct of the constable." The authorities upon the question whether there is a right of action on the bond of a constable or other ministerial officer for damages resulting from a malicious act committed by him while acting under the color of his office in the performance of an official act are conflicting. We shall not enter upon an examination of these authorities, but content ourselves with stating our conclusion, that upon the facts disclosed in this record, the constable was in the performance of an official act, the act of making a levy under an execution in his hands upon the goods of the judgment debtor, when he injured Augusta Balaban; that the wrongful act which caused the injury was directly connected with the levy of the execution and therefore such act must be regarded as official misconduct on the part of the constable, and that for the damages resulting from such act there is a right of action upon his official bond. This conclusion is supported by the following cases: *Cash v. The People*, 32 Ill. App., 250; *Turner v. Sisson*, 137 Mass., 191; *Huffman v. Koppelkom*, 8 Neb., 344; *State v. Beckner*, 132 Ind., 371; *Risher v. Mehan*, 11 Ohio Circuit Ct. Rep., 403, and cases there cited.

The damages awarded cannot under the evidence be held excessive.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Christian Hospital, et al., v. The People of the State of Illinois, ex rel. John B. Murphy.

Gen. Nos. 12,242 and 12,248.

CONSOLIDATED FOR HEARING.

1. **CONTEMPT**—*when violation of injunction appears.* Where it is apparent from all the evidence that there was an attempt to evade an injunction, and the obedience thereof, if obedience there was, was more nominal and pretended than real, an order adjudging in contempt is proper.

2. **INJUNCTION**—*when injury and damage to support, will be inferred.* If a complainant is entitled to an injunction to protect his property rights, injury and damage will be inferred in support of the injunction.

3. **INJUNCTION**—*when verification of bill for, defective.* The verification of a bill for an injunction is defective where the complainant swears that the contents of the bill "are true in substance and in fact except so far they are stated on information and belief, and as to such matters as are stated to be upon information and belief," affiant believes them to be true.

4. **INJUNCTION**—*defective verification of bill will not purge defendant of contempt.* The fact that the bill upon which an injunction has been granted was improperly verified, will not authorize the disobedience of such injunction.

5. **INJUNCTION**—*erroneous granting of, does not preclude holding the defendant in contempt for violation of.* The fact that the granting of an injunction is erroneous is not material by way of defense to a proceeding for contempt for violation if jurisdiction to grant the injunction existed.

6. **INJUNCTION**—*when propriety of granting, must be questioned.* The propriety of granting an injunction cannot be questioned in a proceeding for contempt. Such question can only be raised by a direct proceeding.

Injunctional proceeding. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1906. Affirmed. Opinion filed March 23, 1906.

Statement by the Court. This is an appeal from an order of the Superior Court finding appellants and each of them guilty of contempt in wilfully violating an injunction. Appellant Wood was sentenced to be confined in the Cook County jail for ten days and to pay a fine of \$100.

The Christian Hospital was fined \$250. Each of the defendants prayed and perfected an appeal, and the causes have been consolidated for hearing.

John B. Murphy filed his bill of complaint June 3, 1903, setting forth that he is a licensed physician and surgeon and has been practicing his profession in Chicago for more than twenty years, devoting his attention largely to the practice of surgery and perfecting himself in that branch of his profession. He states that he occupies a number of prominent positions, among them that of professor of surgery in the Northwestern University Medical School, also in the Post Graduate School, surgeon on the attending staff of each of four hospitals in Chicago, president of the Chicago Surgical Society and member of six other medical and surgical societies and associations. For many years he has been engaged in the advancement of his profession and has contributed largely to medical journals, acquired a very extensive acquaintance with the members of his profession throughout the United States and foreign countries, and many patients have travelled from other States to Chicago to be operated upon by him. He has frequently been called to other States to perform operations, and a portion of his practice has developed by means of professional standing he has acquired through other doctors and surgeons and from their recommendations, which constitutes a valuable part of his revenues. May 12, 1903, he received a letter signed by "Christian Hospital, N. News Wood, Pres. & Supt.," informing him that he had been elected president of the medical and surgical staff of the defendant, Christian Hospital, and asking him to accept the honor, allow his name to be placed at the head of its staff and allow them to call him in consultation whenever they have important surgical cases able to reward him with substantial fees. The letter stated the writers had printed an elegant certificate for members of the staff, one of which they sent him with his name neatly engrossed therein and "handsomely framed." The letter was written on a printed letter head of the Christian Hospital,

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upon which complainant's name appears "John B. Murphy, M.D., LL.D., President of Staff."

Complainant states that up to that time he had never heard of the Christian Hospital, had no dealings with anyone purporting to be connected with it, and the receipt of the letter was the first intimation he had of the use of his name in connection therewith. Shortly after the mails brought him letters daily from doctors over the country, some reprimanding him for becoming a party to the alleged fraudulent scheme of said hospital, some warning him that his name was being so used, others inquiring whether he was in fact interested in the institution and some enclosing copies of literature which said hospital and N. News Wood had sent broadcast through the country to members of the medical profession. In some of these publications complainant's name appears as president of staff or as "Præfectus Potestatis Medicorum," especially on proposed certificates of membership where it is accompanied by a picture of complainant in operating attire about to undertake an operation in clinic. He states that use of his name in such connection, as well as the use of such photographs, was and is entirely without his knowledge and consent. This literature purports to have been dated the same day the letter above referred to was addressed to him, but some of it was mailed before that date. Complainant states that mere reading of said literature suffices to convince one that its purpose was to obtain money by false pretenses, falsely representing that complainant and others well known to the medical profession were connected with the said Christian Hospital. He states that such advertising for patients by a physician and surgeon is considered highly unprofessional and one who does it is held in disrepute by his fellow practitioners and all well informed people; that the placing of his name upon its letter heads and the use of his name as president of its staff, or as in any manner connected with said hospital, is an iniquitous deception upon the public and a fraud upon his rights, which has injured him among the members of his profession and shaken the confidence in him of many of

them, causing him loss of their good will as well as financial loss, and will injure him further and irreparably unless such use of his name is enjoined.

The bill prays for an injunction, which was granted and served on the defendants June 3, 1903, the day when the bill was filed. In and by the injunction writ, the Christian Hospital, N. News Wood and others are enjoined from in any manner using John B. Murphy's name, signature or picture in connection with Christian Hospital; from sending out any more literature of the same kind or similar to that sent out by Christian Hospital on or about May 12, 1903, from using, distributing or mailing any letter upon the letter head of said Christian Hospital on which complainant's name appears; from using John B. Murphy's name, signature, picture or alleged signature or picture in connection with any certificate of membership, diplomas or other instrument relative to the business conducted by Christian Hospital; from representing in any manner by word, act or deed, expressly or impliedly, that John B. Murphy is now or ever has been connected with said Christian Hospital or any of the officers thereof; and from in any manner inducing the public or members of the medical profession to believe that said John B. Murphy is connected with the staff of said Christian Hospital as a surgeon or honorary member thereof or in any other manner.

No appearance was entered by the defendants and no answer to the bill filed. Upon the 20th of October, 1904, complainant filed an affidavit and application for attachment asking that appellants be punished for contempt for violation of said injunction, setting up that after issue and service of the injunction writ, and while it was in full force and effect, the defendants delivered to each of a number of persons being licensed physicians named, a certificate of membership in the staff of Christian Hospital, upon which was a picture of complainant and that they sent out literature using the name and picture of complainant in connection with said hospital representing that he was connected therewith, inducing the public and certain of the medical pro-

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fession to believe that he was so connected as surgeon or honorary member of the said hospital's staff. The petition or application was subsequently amended. The defendants demurred to the application, and October 29, 1904, filed an answer admitting service of the writ and asserting it to be void. Respondent Wood answers under oath in his own behalf and that of the Christian Hospital, admitting the issue of certificates containing a picture of a group of persons, but states that he has no knowledge as to whether one of them is or is not Dr. Murphy, denies that it is a good likeness of him and states that at the time of printing the picture and issuing said certificates respondent did not know and did not believe that said Murphy's picture appeared in said group—that the picture is mere matter of ornamentation upon said certificates and has never been expressly or impliedly represented by defendants to be the picture of John B. Murphy. Respondent denies that said defendants or any of them or any one in their behalf induced the parties named in the bill to believe that complainant was connected with said Christian Hospital, but avers that on the contrary before consummating any business with them or issuing certificates to them he fully apprised them that complainant Murphy was in no way connected with said hospital. He denies that since the issue of said injunction the name of complainant has been used in any manner in connection with said hospital except to inform correspondents that said John B. Murphy was not and would not be at any time a member of the hospital staff or in any way connected with it; and that said ornamental picture has not been used in any manner tending to indicate to any person whatever that said John B. Murphy was a member of the staff or in any way connected with said Christian Hospital.

The cause came on to be heard on or about December 29, 1904, upon the application of complainant that said defendants be adjudged guilty of contempt, and all parties being present the court found the defendants guilty of violating the injunction, in that after service of the writ upon

them, they had sold and delivered to certain named physicians and surgeons certificates of membership in the staff of the Christian Hospital, upon which certificates appeared when delivered a picture and the name of the said John B. Murphy; that by literature delivered to certain purchasers of such certificates, said purchasers were induced to and at the time of delivery of said certificates did believe that said John B. Murphy was or had been connected with said Christian Hospital and was a member of its medical and surgical staff.

W. KNOX HAYNES and CHARLES C. GILBERT, for appellants; W. KNOX HAYNES, of counsel.

KNIGHT & BROWN, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is urged that the Superior Court erred, in adjudging the defendants or either of them guilty of wilfully violating the injunction, that there is no evidence tending to show complainant was damaged by the alleged acts of the defendants or either of them, that the injunction was granted in violation of the statute upon a defective affidavit and that the court was without jurisdiction.

First. Assuming for the purposes of the argument that the Superior Court had lawful authority to issue the writ of injunction, it is contended nevertheless by appellants' counsel that it must appear from the evidence and does not so appear, that the respondent, N. News Wood, A.M., M.D., who represents both himself and the other appellant, wilfully violated it with intent to set at naught and bid defiance to the authority of the court. In *Hughson v. The People*, 91 Ill. App., 396-398, we said, "where disobedience of a decree is not wilful and does not clearly appear to have arisen from intent to set at naught or bid defiance thereto, the power to punish for contempt cannot be properly exercised." We held in that case there was "apparently no reason to suppose that either the corporation or appellants

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had any intention of refusing to comply with the decree." See also *Kahlbon v. The People*, 101 Ill. App., 567. There is not, so far as we can discover, any claim that defendants ever had actual authority to use complainant Murphy's name in connection with the Christian Hospital or its staff. Defendant Wood states that he was informed by some one not produced that Dr. Murphy was not unwilling. This was at the most a very slender excuse for making use of the name of a physician and surgeon of good standing as endorsing an institution issuing advertising matter such as appears in this case. Whether it is in accordance with the ethics of the medical profession to offer to those sending cases to the hospital a cash commission of 25 per cent. in medical cases and 50 per cent. in surgical cases, together with a proposition that a medical man sending a case might himself spend a few days there taking a post graduate course while "the patient (through us) will pay all your expenses," we need not stop to inquire. It is to be hoped that no reputable physician or surgeon would be willing to have his name exploited as a party to such a scheme.

Appellant Wood states under oath his version of the manner in which he came to make use of complainant's name. From his answer it appears to have been thought desirable to obtain some well known physician to accept the honorary position of chief of the staff of the new Christian Hospital, a corporation of which he—Wood—is principal owner. With this end in view one Arthur C. Probert, who was, respondent says, engaged with him in the enterprise of selling to medical men certificates of membership in the hospital, undertook to procure such well known physician to act as honorary president. He reported that he had obtained the assent of Dr. John B. Murphy, the complainant, to acceptance of such appointment. Acting upon this information, certificates were engraved and letter heads prepared upon which Dr. Murphy's name and apparently a *facsimile* of his signature appear, representing him as president of staff. Some of these were mailed before any notice of such use of his name was communicated to com-

plainant. Two days thereafter—May 12, 1903—a certificate of appointment was sent to complainant, engraved and “handsomely framed,” accompanied by a letter of that date expressing the “desire that you accept this honor” and requesting him to notify the defendants “of your acceptance of this appointment.” This, according to the bill, was the first time complainant had ever heard either of the Christian Hospital or its President N. News Wood. The latter states that hearing nothing to the contrary from Dr. Murphy, he proceeded in good faith in the belief that the use of the name was with complainant’s full assent, such belief being founded on the representation of Probert and the silence of Dr. Murphy after receipt by him of appellants’ letter of May 12th, without protest, repudiation or suggestion, as it is said, that such use of his name was contrary to his wishes. Respondent states that upon service of the writ of injunction June 3, 1903, which he says was the first notice he received that such use of Dr. Murphy’s name was contrary to the latter’s wishes, he at once proceeded so far as was in his power to undo all that had been done in the premises affecting Dr. Murphy; that he returned to every person who had purchased such membership the amount paid therefor and sent with such remittance a letter, which is set forth in full, stating in substance that Dr. Murphy had “repudiated his appointment as president of the staff” of the hospital and “claimed that his name had been used without authority for the probable purpose of inducing you and other physicians to become members of the general staff of the hospital.” The letter further states that the hospital desires to practice no deception or obtain money under any misrepresentation or misconception, and therefore encloses check for the amount which had been remitted, so that if dissatisfied the recipient could retain the check and return his certificate of membership, or if desirous of retaining membership send back the check. Respondent further states that thereafter in response to further requests for membership in a letter (also set forth in full) was sent to every new applicant stating in substance that the use of Dr. Murphy’s name representing him to be

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president of the surgical staff of the hospital had been repudiated and that Dr. Murphy claimed the use of his name had been the inducing cause by which other physicians had been induced to join the staff. The applicant was informed that if the representation that Dr. Murphy was president of the hospital was in any way an inducing cause for his application, the hospital "would have to decline to take your money or issue you a certificate." Respondent avers that in each of the cases where affidavits had been made in behalf of appellee, the purchase of membership and issue of certificate was with full knowledge of the applicant after having been advised by appellant that Dr. Murphy was in no way connected with the hospital. This last averment appears to be sustained by original letters from persons concerned, produced to the Superior Court and shown in the record before us.

With reference to the picture alleged to represent Dr. Murphy in operating costume at a clinic, respondent states under oath that it represents an operating room in a hospital and a clinical demonstration, at which a large number of persons are portrayed; that the picture was used as an embellishment of the certificates; and that none of the persons portrayed in said picture, as affiant believes, is Dr. John B. Murphy; that at the time of designing the certificate affiant believed that a picture of an operating room would be a proper ornamentation for such certificate, and obtained a photograph which had been publicly published under such circumstances that affiant is advised and believes no proprietary rights in it could exist and it was the common property of any one who desired to reproduce it; that he was informed and believed at the time and now believes the prominent figure at the operating table in said picture to be Dr. John B. Deaver of Philadelphia, and that he bases such opinion upon the printed title to said picture which he says represented it to be Professor J. B. Deaver. Affiant further states that he was not apprised at the time of the service of the writ of injunction that said ornamental picture was claimed by complainant to be his picture, and that

in the further use of certificates containing said picture, he was under the absolute belief that Dr. Murphy's picture did not appear upon said certificates, and that he had a lawful right to use said published picture or any other so long as it did not contain the picture of the complainant. There are other affidavits taking up in detail cases in which it is charged the injunction was violated, and tending to show that in such cases no violation occurred. Respondent states he had no desire to make any use of Dr. Murphy's name or picture after the injunction issued and therefore entered no defense to the suit and paid no attention to it. He insists that he "has, as he believes, observed the said injunction order since its issue both in letter and spirit." The published photograph from which the engraved picture in controversy was reproduced contains an inscription as follows: "Professor J. B. Deaver conducting Professor J. B. Murphy's clinic, New Clinical Amphitheatre at Mercy Hospital, Chicago, Feb. 13, 1903. Photo by C. E. Waterman, 5413 Jackson Ave., Chicago."

Whatever opinion may be entertained of the ethics of the advertising methods pursued by the respondent, the question whether he was properly adjudged guilty of contempt for violating the injunction is one of fact and intent. The affidavits of Doctors Haines, Beam and Gray, filed in behalf of complainant, are apparently disproved by their own letters produced in evidence. Respondent states that subsequent to the issue of the injunction he directed an employee to blot out and erase Dr. Murphy's name from certificates subsequently issued, and that in two cases while the name is partially blurred by a rubber stamp and the name of another doctor appears above it, yet the name of Murphy is partially exposed. Respondent swears that he was not aware of this, and that if he had been, such forms of certificate would not have been issued. If it appeared that the certificates referred to indicated sufficiently the intention to erase the complainant's name and substitute another, this explanation might serve to disprove the charge of wilful violation of the court's order. But there is evidence tending to show

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that not in one case only, but in others, the effect of the rubber stamp has been not to blur or efface the complainant's name, but rather to emphasize it. In some of these engraved forms sent out after service of the injunction as an inducement to physicians to purchase certificates of membership in the hospital staff, the effect of the stamp was to furnish a background upon which complainant's name stands out rather more conspicuously than the others, as president of the hospital staff. The purpose of the stamp might well be understood to have been to insert another name above that of complainant instead of obliterating the name of the latter. The injunction restrained appellant from representing in any manner that Dr. Murphy "was then or ever had been connected with said Christian Hospital or any of the officers thereof." The use of these certificates was a representation in effect that Dr. Murphy had been at least connected with it, and might be understood as indicating that he was still so connected. The evidence that Dr. Murphy's is the most prominent figure in the picture is preponderating; and when the latter was published under the name "Christian Hospital" with a *facsimile* of complainant's signature purporting to show that he was or had been president of the staff of said hospital, its use was certainly a violation of that part of the injunction prohibiting the use of complainant's name, signature or picture in connection with the hospital. The picture alone without the accompanying name and signature was probably public property. We are of opinion that whatever may have been in appellant's mind his intent as revealed by acts showed a wilful violation of the injunction. It was his duty, if he intended to respect it in letter and spirit, to make no use of forms containing complainant's name.

Nor do we think the letters sent out by appellant after service of the writ, exonerated him from attempted evasion if not violation of the injunction. While one of them states that since the original representation was made complainant had "repudiated his appointment as president of the staff, and has claimed that his name had been used without au-

thority for the probable purpose" of inducing other physicians to become members, another letter states that "since that time there has been a misunderstanding with Dr. Murphy, and he declines to remain or be represented as president of the staff," etc. This language conveys the impression not that Dr. Murphy was not and never had been connected with the hospital, but that owing to a "misunderstanding" he had severed a relation which in fact never existed. Special care was used to avoid giving any just idea as to the nature of the so-called misunderstanding, and the phraseology employed tended rather to reflect injuriously upon Murphy than otherwise. We are of opinion appellants were properly adjudged guilty of wilful violation of the injunction.

Second. It is said that there is no evidence of damage suffered by complainant. The bill contains allegations which are not denied, tending to show that respondents' alleged conduct is and has been prejudicial to complainant and productive of pecuniary loss. The chancellor found that he was entitled to the injunction and if so entitled, complainant is also entitled to be protected against its violation, since in such case "injury and legal damage will be inferred." *Loven v. The People*, 158 Ill., 159-169.

Third. It is said that the injunction was erroneously issued upon a bill not properly verified. That the affidavit was defective is, we think, evident. In it, complainant swears that the contents of the bill "are true in substance and in fact, except so far as they are stated on information and belief; and as to such matters as are stated to be upon information and belief," affiant believes them to be true. What part of the contents of the bill are included in the exception, and yet not stated in the bill to be on information and belief, the affiant does not indicate. The affidavit actually verifies nothing in the bill, but matters stated therein to be on information and belief. *Stirlen v. Neustadt*, 50 Ill. App., 378. If, however, equity clearly has jurisdiction of the subject-matter and the parties "a defect in the verification of the bill certainly could not oust the court of jurisdic-

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tion." *North v. Schwartz*, 79 Ill. App., 557-559. The defect might be a reason for dissolving the injunction on motion, but appellants had no warrant to disobey the injunction because in their opinion the bill was not properly verified.

Fourth. It is contended that the Superior Court had no jurisdiction to issue the writ of injunction. The ground for this contention is that the bill is based upon appellants' alleged misconduct in using complainant's name in a manner calculated to bring him into disrepute with fellow members of his profession, and that this is equivalent to saying that the acts of the respondents are libelous. Consequently, it is argued, the subject-matter of the bill is not cognizable in equity, the writ of injunction was void and appellants not guilty of contempt in disobeying it. If we assume that the complainant had an adequate remedy at law, the writ of injunction is not necessarily void, even if the Superior Court be deemed to have erroneously exercised its power to issue the injunction. In *Curtiss v. Brown*, 29 Ill., 201-231, it was said by Mr. Chief Justice Caton that "in many cases the question of jurisdiction is considered as distinct from that of power. We often find the jurisdiction denied where the power exists, but ought not to be exercised, and in this sense is the word jurisdiction usually used when applied to courts of chancery. Where there is a want of power the decree is void collaterally, but where there is said to be a want of jurisdiction merely it is only meant that it would be erroneous to exercise the power and the decree would be reversed on appeal. It means a want of equity and not a want of power." In *Sumner v. The Village of Milford*, 214 Ill., 388-393, it is said: "Jurisdiction is authority to hear and determine a cause—authority to decide. It is the power conferred by law to hear and determine controversies concerning certain subjects, and as applied to the particular controversy it is the power to hear and determine that controversy. (11 Cyc. 660; *People v. Talmage*, 194 Ill., 67.) If a court has jurisdiction, its judgment may be directly attacked for errors or irregularities, but however manifestly erroneous the

decision may be, it is binding until reversed or set aside in a direct proceeding for that purpose. The exercise of the jurisdiction may be erroneous, but if the court has authority to decide the case at all, every party brought within the jurisdiction must make his defense, and the judgment can only be set aside by appeal or on error when such remedy is available. In *Hunt v. Hunt*, 72 N. Y., 217-229, it was said that jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case; and again, "Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case arising or which is claimed to have arisen under that general question." Here the Superior Court had jurisdiction of the subject-matter and the parties.

It has been held that an injunction will not lie to restrain the circulation of derogatory statements because if libelous the injured party had a remedy in a court of law. *Chi. City Ry. Co. v. Gen. Elec. Ry. Co.*, 74 Ill. App., 465-474. Appellants' counsel cite *Clark v. Freeman*, 11 Beaven's Rep., 112-118, in which the name of Sir James Clark, an eminent English physician, was fraudulently used with the addition of an e to the last name in connection with so-called "consumption pills," and an injunction was refused on the ground that the offense must first be established at law. In *Routh v. Webster*, however, 10 Bevan, 561, where, much as in the present case, the name of the complainant was published without authority in a prospectus as a trustee of the company, the Master of the Rolls granted an injunction. The propriety of the injunction order in the case at bar is not, however, before us. Appellants' claim is that as against a libel or slander a court of equity will not enjoin, because the question should first be submitted to a jury. *Flint v. Hutchinson S. B. Co.*, 16 L. R. A., 243. But there are cases in which a court of equity will assume jurisdiction, even though there may be an adequate remedy at law. The general rule to the contrary has its exceptions. *Fraizer v.*

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Miller, 16 Ill., 48, 49, 50; Tunesma v. Schuttler, 114 Ill., 156-164; Stickney v. Goudy, 132 Ill., 213-227; G. T. & C. G. R. R. Co. v. Walton, 150 Ill., 428-436. Whether the power to grant the injunction was rightfully exercised in this case on the ground of fraud or injury to property rights or otherwise, is a question which could only be properly determined in a direct proceeding upon appeal from the injunction order. Until so reviewed and reversed or set aside it is binding and must be obeyed.

The judgment of the Superior Court will be affirmed in both cases.

Affirmed.

Frank Goedecke v. The People of the State of Illinois.

Gen. No. 12,274.

1. JUDGMENT NON OBSTANTE VEREDICTO—*when erroneous*. It is error to enter judgment *non obstante veredicto* where a material issue has been raised by a good plea and determined by the jury from the evidence.

2. MOTION FOR NEW TRIAL—*when may be renewed*. Where a party has withdrawn his motion for a new trial in order to move for a judgment *non obstante veredicto*, he may, upon such judgment being set aside, renew his motion for a new trial.

Quo warranto proceeding. Appeal from the Circuit Court of Cook County; the Hon. JULIAN W. MACK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed and remanded. Opinion filed March 23, 1906.

NICHOLAS MICHELS, for appellant; WOOD, FYFFE & AD-
COCK, of counsel.

JOHN J. HEALY, State's Attorney, for appellee; CHURCH,
McMURDY & SHERMAN, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.
This was an information in the nature of *quo warranto*,

to test the validity of a license issued to appellant to keep a dram-shop at and upon the premises 5008 Cottage Grove avenue, within what is known as the local option district of the former village of Hyde Park. A plea of justification was filed, which together with the facts in evidence, are as stated in *The People v. Griesbach*, 211 Ill., 35, to which reference may be had. The causes are in all substantial respects identical and were submitted to the jury upon like stipulations, under which either party might prove any fact or raise any question of law which could properly be proved or raised under any pleadings appropriate to the causes. They were tried together. The question here involved is whether appellant had complied with the ordinance requiring an application for a license in that locality to be signed by a majority of the property owners according to frontage on both sides of the street in the block in which such dram-shop is to be kept. To be valid the application should bear the signatures of the owners of 2252.52 feet of frontage. That in controversy purported to contain the signatures of owners of 2347.13 feet, but one of them, Charles Nottbohm, owner of 214.34 feet subject to the dower of his mother Mathilda Nottbohm, was, as the evidence shows, a minor, and his mother, whose signature was also appended to the application, was his guardian. She did not sign as guardian but apparently in her individual capacity, attaching her name without suggestion of guardianship or interest.

After the trial, pending the appeal in the *Griesbach* case, a jury having returned a verdict in the case at bar in favor of appellant, the People moved for a new trial, and pursuant to an understanding between counsel and the court, it is said, the present case was allowed to rest on the motion for a new trial to await the outcome of the appeal in the *Griesbach* case. The judgment in that case was reversed by the Supreme Court and the cause remanded for further proceedings. Thereafter the People withdrew the motion for a new trial in the case at bar by leave of court and moved for judgment of ouster *non obstante veredicto*. The court

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entered judgment accordingly, from which this appeal is taken.

Assuming as contended by counsel for appellee that the judgment complained of may be such as under the views expressed by the Supreme Court in *People v. Griesbach*, will eventually be rendered, it is nevertheless erroneous as the cause now stands. There was a verdict of a jury in favor of appellant. It is true that the court might as now advised have directed a verdict upon that evidence for the People and entered judgment accordingly; but at that time the trial court was of opinion which it acted upon in the *Griesbach* case, that judgment might properly follow the verdict in favor of appellant. Having submitted the cause to the jury upon evidence which tended to support appellant's contention and upon which a verdict was rendered in his favor, if upon further consideration the court was of opinion the verdict should be set aside, the motion for a new trial should, we think, have been granted. Here there was a plea of justification, and it was not for the court to say that appellant should not have an opportunity to offer further evidence if any he had, in addition to that which the jury had thought sufficient. The jury was wrong in finding in appellant's favor upon the evidence before it. The fault was not in the pleadings. A verdict cannot help an immaterial issue. There was, however, a material issue raised by a good plea in the present case, and a judgment *non obstante veredicto* could not properly be rendered. *Hitchcock v. Haight*, 2 *Gilman*, 604-611; *Gould on Pleading*, 5th ed., sec. 46, p. 482. It is said in *Ency. of Pl. & Pr.*, vol. 11, title "Judgments," p. 919, that "such judgment will not be rendered where there is substantially a material issue or a good defense, although the pleading is technically defective." Here there is no defect in the pleading. The trouble is that the evidence does not warrant the verdict, and a new trial must be granted.

The *Griesbach* case was reversed and remanded by the Supreme Court for a new trial upon the same pleading and evidence as in the case at bar. Such is the force and effect

of the language, viz.: "For such other and further proceedings as to the law and justice shall appertain." *Hoveland v. McNeill*, 104 Ill. App., 149; *City of Paxton v. Bogardus*, 188 Ill., 72-74.

Appellant urges that the People's motion for a new trial having been withdrawn, he is entitled to judgment on the verdict in his favor. In this we do not concur. If the People desire to renew the motion for a new trial, we discover no reason why they may not be permitted to do so.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Benjamin Mayer v. The Automobile Exchange.

Gen. No. 12,287.

1. **WARRANTY**—*right to recover damages for breach of.* Damages consisting of the difference between the actual value of an article of personal property purchased and the value of the same if it had been as warranted, may be recovered without tendering back such article of personal property.

Action of *assumpsit*. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Reversed and remanded. Opinion filed March 23, 1906.

Statement by the Court. Appellant purchased a second-hand automobile of appellee, who it is said was acting for a third party. Subsequently he sued upon two special counts for an alleged breach of warranty of the machine, adding the common counts to the declaration. The bill of particulars, filed in obedience to an order of court, recites that plaintiff sues to recover \$250 paid for the automobile, \$5 a month for costs and expense of storing it, outlays in attempting to repair, and for certain tools owned by him, retained by defendant, and states that the "suit is based upon the breach of the conditions of warranty."

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At the conclusion of the plaintiff's evidence, the court on motion of the defendant directed a verdict, and gave judgment accordingly, from which this appeal is taken.

WILLIAM FRIEDMAN, for appellant.

HUTTMAN, BUTTERS & CARR, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is urged in behalf of appellant that the Superior Court erred in holding it incumbent on the plaintiff to show the machine had been tendered back to appellee and in excluding all testimony as to defects and damages; that there having been a sale and delivery of the specific chattel accompanied by an express warranty, the vendee had a right to take and use the chattel and sue for damages on the breach of warranty, and was not obliged to tender back the machine.

There was evidence in writing introduced in behalf of appellant tending to show that the machine was "guaranteed to be in perfect condition," and that it was delivered to and accepted by appellant. Under the two special counts upon the warranty, appellant could properly recover actual damages, if any, caused by its breach, viz.: the difference between the value of the automobile as warranted and its actual value in its alleged defective condition. It was not necessary to return or tender back the machine. *Skinner v. Mulligan*, 56 Ill. App., 47-49. It was said in that case (p. 51) the vendee's "remedy was upon the warranty alone and his right of recovery was limited to the amount of depreciation due to the breach." In *Underwood v. Wolf*, 131 Ill., 425-434, it is said "guaranties are treated as warranties and their non-fulfillment, if they were not fulfilled, will be regarded as a breach of the warranty." The well-settled rule is stated that where there is a sale and delivery of personal property *in presenti* with express warranty and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty, or when sued for the purchase price may recoup such damages under

the general issue or set them up in a special plea of set-off. The conditions under which merchandise may be returned by the purchaser or the contract rescinded are stated in *Mayes v. Rogers, Schwartz & Co.*, 47 Ill. App., 372-375, to which reference may be had. In the case at bar, the machine was accepted by the purchaser and his remedy was upon the warranty. He had no right to rescind the contract, and made no attempt to do so.

It is claimed in behalf of appellee that under the bill of particulars,—assuming it to be properly entitled to consideration as the record stands—no proof could be offered by appellant except such as was admissible under the common counts. In this the trial court apparently agreed and erroneously excluded evidence of breach of warranty and of damages. The special counts were on file. Appellant was seeking to recover under those counts. The bill of particulars itself states that the “suit is based upon a breach of the conditions of warranty.” Appellant claims the automobile as delivered had no value. He was entitled to offer evidence, if any he had, tending to support the contention that he was damaged to the extent of the purchase price.

We deem it unnecessary to consider the cross errors assigned or the motion to strike out the original bill of exceptions. The stipulation is sufficient.

The judgment of the Superior Court must be reversed and the cause remanded.

Reversed and remanded.

City of Chicago v. Stanley McCormick.

Gen. No. 12,300.

1. SPECIAL ASSESSMENT REBATES—*action lies to recover.* An action lies to recover of a municipality special assessment rebates unlawfully withheld. Citing, *City of Chicago v. Singer*, 116 Ill. App. 559; *City of Chicago v. Fisk*, 123 Ill. App. 404; *City of Chicago v. Paulsen*, *ante* p. 595; *City of Chicago v. Levy*, *post*, p. 652.

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2. AFFIRMANCE WITH DAMAGES—*when will be awarded.* Where it is apparent from the character of the issues and the briefs and arguments that an appeal has been taken merely for delay, an affirmance will be awarded with statutory damages.

Action commenced before justice of the peace. Appeal from the County Court of Cook County; the Hon. DWIGHT C. HAVEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed with damages. Opinion filed March 23, 1906.

ROBERT REDFIELD and FRANK JOHNSTON, JR., for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

E. C. WESTWOOD, for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This was a suit brought originally before a justice of the peace, and appealed from the justice to the County Court. It is one of quite a number of similar cases which the city has from time to time brought here on appeal upon like questions of law and fact.

There is no controversy over the facts. They are stipulated. Appellee paid a special assessment for a street improvement levied upon certain real estate of which he was the owner. The amount so assessed turned out to be in excess of the cost of making the improvement. Appellee's proportionate share of the excess amounted to \$55.05 which he was lawfully entitled to receive as rebate. No part of it has been paid back, although frequent demand for it has been made. A statement of the condition of this assessment fund shows there is no money left in it. The city's contention in all these cases is the same, first that rebates on special assessments are payable only out of the special fund for an improvement and cannot be recovered out of the general fund of the city in an action of assumpsit; second, that if there was an improper administration of the fund by the city officials, by reason of which a shortage in the fund was cre-

ated, the remedy must be against the officers and not against the corporation.

We have repeatedly passed upon these questions adversely to the city's contention. Two of this class of cases decided in this court are, *City of Chicago v. Singer*, 116 Ill. App., 559, and *City of Chicago v. Albright*, No. 11,351, not to be reported, and there are others. *City of Chicago v. Fisk*, 123 Ill. App., 404; *City of Chicago v. Paulsen*, *ante*, p. 595; *City of Chicago v. Levy*, *post*, p. 652. *City of Chicago v. McNichols*, 98 Ill. App., 448, is also in point in some respects. Appellant's attorneys refrain from reference in their briefs to any of the previous decisions. The assignments of error in all the cases are, so far as we have examined, identical. The briefs and arguments filed in behalf of the city are word for word the same. The *Singer* case was decided and the opinion filed October 25, 1904. The present case was appealed in February, 1905, when appellant was fully advised of the views of this court upon the subject-matter. For reasons fully stated in the *Singer* and other cases the judgment of the County Court is affirmed, with statutory ten per cent. damages, it being obvious the appeal was prosecuted for delay. (R. S. Chap. 33, sec. 23.)

Affirmed with ten per cent. damages.

City of Chicago v. J. Levy.

This case is controlled by the decision in *City of Chicago v. McCormick*, *ante* p. 650.

Action of assumpsit. Appeal from the County Court of Cook County; the Hon. DWIGHT C. HAVEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1905. Affirmed with statutory damages. Opinion filed March 23, 1906.

ROBERT REDFIELD and FRANK JOHNSTON, JR., for appellant; EDGAR BRONSON TOLMAN, Corporation Counsel, of counsel.

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No appearance for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The judgment in this case will be affirmed with statutory damages of ten per cent., for reasons stated in City of Chicago v. McCormick, *ante*, p. 650, decided at this term of court.

Affirmed with statutory damages.



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